Customs Bulletin

Regulations, Rulings, Decisions, and Notices concerning Customs and related matters

and Decisions

of the United States Court of Appeals for the Federal Circuit and the United States Court of International Trade

Vol. 24 OCTOBER 3, 1990 No. 40

This issue contains:

THE DEPARTMENT OF THE TREASURY
U.S. Customs Service

NOTICE

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U.S. Customs Service

Treasury Decisions

19 CFR Part 134

(T.D. 90–75)

[RIN 1515–AA83]

COUNTRY OF ORIGIN MARKING OF NATIVE AMERICAN-STYLE ARTS AND CRAFTS

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Final rule.

SUMMARY: This document amends the Customs regulations by adding Native American-style arts and crafts to those categories of articles which are subject to specific country of origin marking requirements. The regulations require, subject to certain exceptions, Native American-style arts and crafts to be indelibly marked with the country of origin by means of cutting, die-sinking, engraving, stamping, or some other equally permanent method.

EFFECTIVE DATE: October 18, 1990.

FOR FURTHER INFORMATION CONTACT: Robert Dinerstein, Value, Special Programs & Admissibility Branch, U.S. Customs Service (202) 566–5765.

SUPPLEMENTARY INFORMATION:

Background

Articles of foreign origin imported into the U.S. are required to be marked in a conspicuous place as legibly, indelibly, and as permanently as the nature of the article will permit in a manner indicating to the ultimate purchaser in the U.S. the country of origin in English, pursuant to § 304, Tariff Act of 1930, as amended (19 U.S.C. 1304). Part 134, Customs Regulations (19 CFR Part 134), implements the country of origin marking requirements and exceptions of 19 U.S.C. § 1304.

By a document published in the Federal Register on August 31, 1989 (54 FR 36039), comments were requested on a proposed amendment to 19 CFR Part 134 to require indelible country of origin marking on Native American-style arts and crafts. The comment period was reopened for an

additional 60 days by a document published in the Federal Register on January 19, 1990 (55 FR 1837).

ANALYSIS OF COMMENTS

Comments were received from the U.S. Department of the Interior, Indian Arts and Crafts Board, the Tulalip Tribes, Maysville, Washington, the Navajo Nation, and the Hopi Tribe. The Indian Arts and Crafts Board supports the amendment but recommends three changes. The Board suggests that "beadwork" be added to the types of products mentioned as examples of Native American-style arts and crafts. According to the comments of the Board, beadwork is a major category of products produced by Native American craftsmen, and because it is labor intensive, imitations are often produced in countries with low wage scales. The Board states that it is not aware of a significant production of blankets by Native Americans and believes the inclusion of blankets among the examples cited in § 134.43(d)(1) would result in confusion. The Board also recommends that in the definition of Native American-style arts and crafts in § 134.43(d)(1), the word "traditional" should be omitted and replaced by the word "typical".

Customs has incorporated the first two recommendations by adding "beadwork" to the list of examples provided in § 134.43(d)(1) and deleting "blankets" from the list. However, Customs has determined that it would be inappropriate to change "traditional" to "typical". The use of "typical" in defining Native American-style arts and crafts and the use of "traditional" in defining Native American-style jewelry would be inconsistent. Although the term "traditional" necessitates examination of past characteristics of Native American jewelry or arts and crafts, as those designs, materials and/or methods of construction change over time, the identification of those arts and crafts covered by the regulations will also change. Additionally, the use of "typical" would be unnecessarily vague due to difficulty in ascertaining design motifs, materials and/or methods of construction which are typical of those used by Native Americans at any given time.

The Tulalip Tribes request that the final regulation include a section on raw materials. The Tulalip Tribes noted that imported counterfeit "turquoise" stones are often incorporated into finished jewelry and sold as "Indian goods", and foreign raw materials are often repacked and sold as Indian made. The regulations governing country of origin marking of Native American-style arts and crafts cannot address every problem associated with the misrepresentation of articles sold in the U.S. as genuinely Native American. The manner of country of origin marking on imported raw materials used in finished jewelry is not within the scope of § 1907(c) of the Omnibus Trade and Competitiveness Act. Requiring indelible country of origin marking on all imported raw materials which could be used in the manufacture of Native American articles goes beyond statutory requirements. Inasmuch as the regulations cannot override the provisions of the statute, inclusion of raw materials in the

regulation covering Native American-style arts and crafts would be inappropriate.

The Navajo Nation generally supports the amendment as an appropriate method for protecting Native Americans who depend on the sale of their arts and crafts and consumers who purchase imported goods which they believe to be handmade by Native Americans. In that it may be difficult for Customs inspectors to recognize symbols or items which could be mistaken for Native American designs, the Navajo Nation suggests that guidelines be provided in order to determine items which can be sold as Native American designs. The Navajo Nation also seeks to have borderline cases fall within the requirements of this amendment.

Customs is of the opinion that drafting of guidelines at this time would be premature and that only through experience can the best methods for ensuring compliance be determined. If circumstances necessitate, Customs at a later date may consider establishing guidelines for administering the marking requirements of Native American-style arts and crafts. Additionally, the language of the proposed amendment is drafted to take account of borderline cases by including the phrase "could possibly be mistaken for." Items that could possibly be mistaken for arts and crafts made by Native Americans will fall within the marking requirements of the proposed amendment.

The Hopi Tribe endorsed the concept of indelible marking on imported products that could be mistaken for arts and crafts made by Native Americans but expressed concern over imitation items produced in the U.S. which incorporate traditional design motifs, material or construction and could be mistaken for genuine arts and crafts made by Native Americans. The Hopi Tribe requests that Customs apply the provisions of 15 U.S.C. 45 regarding unfair methods of competition to imported imitation arts and crafts.

The concerns of the Hopi Tribe are beyond the scope of § 304 of the Tariff Act of 1930, as amended (19 U.S.C. 1304), the country of origin marking statute enforced by Customs, which pertains only to articles of foreign origin. The provisions of 15 U.S.C. 45 and its implementing regulations are within the jurisdiction of the Federal Trade Commission.

Section 134.43(d)(1) as set forth in the proposed rule (54 FR 36039) defined Native American-style arts and crafts as "arts and crafts * * * which incorporate traditional Native American design motifs, materials or construction and therefore look like, and could possibly be mistaken for, arts and crafts made by Native Americans." Because the imported articles covered by the regulation may incorporate one or more of traditional Native American design motifs, materials or construction, the "and/or" conjunction used in § 134.43(c)(1) is preferable to the "or" conjunction used in proposed § 134.43(d)(1). Accordingly, the "or" conjunction contained in the previously proposed addition of § 134.43(d)(1) is being replaced by the conjunction "and/or" in this final rule.

EXECUTIVE ORDER 12291

This document does not meet the criteria for a "major rule" as specified in E.O. 12291. Accordingly, no regulatory impact analyses has been prepared.

REGULATORY FLEXIBILITY ACT

Pursuant to the provisions of the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*), it is certified that the regulation amendment will not have a significant impact on a substantial number of small entities. Accordingly, it is not subject to the regulatory analyses or other requirements.

DRAFTING INFORMATION

The principal author of this document was Michael Smith, Regulations and Disclosure Law Branch, Office of Regulations and Rulings, U.S. Customs Service. However, personnel from other offices participated in its development.

LIST OF SUBJECTS IN 19 CFR PART 134

Customs duties and inspection, Labeling, packaging and containers.

AMENDMENT

Accordingly, Part 134, Customs Regulations (19 CFR Part 134), is amended as set forth below:

PART 134—COUNTRY OF ORIGIN MARKING

1. The authority citation for part 134 continues to read as follows:

Authority: 5 U.S.C. § 301, 19 U.S.C. §§ 66, 1202 (General Note 8, HTSUS), 1304, 1624.

2. Section 134.43 is amended by adding a new paragraph (d) to read as follows:

§ 134.43 Methods of marking specific article

* * * * * * *

(d) *Native American-style arts and crafts.* (1) *Definition.* For the purpose of this provision, Native American-style arts and crafts are arts and crafts, such as pottery, rugs, kachina dolls, baskets and beadwork, which incorporate traditional Native American design motifs, materials and/or construction and therefore look like, and could possibly be mistaken for, arts and crafts made by Native Americans.

(2) *Method of marking.* Except as provided for in 19 U.S.C. § 1304(a)(3) and § 134.32 of this part, Native Americanstyle arts and crafts must be indelibly marked with the country of origin by means of cutting, die-sinking, engraving, stamping, or some other equally permanent method. On textile articles, such as rugs, a sewn in label is considered to be an equally permanent method.

(3) *Exception.* Where it is technically or commercially infeasible to mark in the manner specified in paragraph (d)(2) of this section, the arti-

cle may be marked by means of a string tag or adhesive label securely affixed, or some other similar method.

CAROL HALLETT,
Commissioner of Customs.

Approved: August 22, 1990.
JOHN P. SIMPSON,
Acting Assistant Secretary of the Treasury.

[Published in the Federal Register, September 18, 1990 (55 FR 38316)]

(T.D. 90–76)

REVOCATION OF CORPORATE CUSTOMS BROKER'S LICENSE NO. 10121 ISSUED TO EXIM CUSTOMS BROKERS, INC.

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: General Notice.

SUMMARY: Notice is hereby given that the corporate Customs broker license (number 10121) issued to Exim Customs Brokers, Inc., has been revoked by operation of law pursuant to section 641 (b)(5), Tariff Act of 1930, as amended (19 U.S.C. 1641 (b)(5)), for failure to have for a continuous period of 120 days at least one validly licensed officer of the corporation. Such revocation was efffective September 11, 1989.

Dated: September 13, 1990.

VICTOR G. WEEREN,
Director,
Office of Trade Operations.

[Published in the Federal Register, September 24, 1990 (55 FR 39076)]

U.S. Customs Service

General Notice

CURRENT IRS INTEREST RATE USED IN CALCULATING INTEREST ON OVERDUE ACCOUNTS AND REFUNDS

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Notice of calculation of interest.

SUMMARY: This notice advises the public of the interest rates for overpayments and underpayments of Customs duties. The rates are 11 percent for underpayments and 10 percent for overpayments for the quarter beginning October 1, 1990. This notice is being published for the convenience of the importing public and Customs personnel.

EFFECTIVE DATE: October 1, 1990.

FOR FURTHER INFORMATION CONTACT: Robert B. Hamilton, Jr., Revenue Branch, National Finance Center (317) 298-1245.

SUPPLEMENTARY INFORMATION:

BACKGROUND

Pursuant to 19 U.S.C. 1505 and Treasury Decision 85-93, published in the Federal Register on May 29, 1985 (50 FR 21832), the interest rate paid on applicable overpayments or underpayments of Customs duties shall be in accordance with the Internal Revenue Code rate established under 26 U.S.C. 6621. Interest rates are determined based on the short-term federal rate. The interest rate that Treasury pays on overpayments will be the short-term Federal rate plus 2 percentage points. The interest rate paid to the Treasury for underpayments will be the short-term Federal rate plus 3 percentage points. The rates will be rounded to the nearest full percentage.

The interest rates are determined by the Internal Revenue Service on behalf of the Secretary of the Treasury based on the average market yield on outstanding marketable obligations of the U.S. with remaining periods to maturity of 3 years or less and are to fluctuate quarterly. The rates are determined during the first month of a calendar quarter and become effective for the following quarter.

The rates of interest for the period of October 1, 1990 – December 31, 1990, are 10 percent for overpayments and 11 percent for underpayments. These rates will remain in effect through December 31, 1990, and are subject to change on January 1, 1991.

Dated: September 18, 1990.

MICHAEL H. LANE,
Acting Commissioner of Customs.

[Published in the Federal Register, September 24, 1990 (55 FR 38983)]

U.S. Court of Appeals for the Federal Circuit

BORLEM S.A. – EMPREEDIMENTOS INDUSTRIAIS, AND FNV – VEICULOS E EQUIPAMENTOS S.A., PLAINTIFFS CROSS-APPELLANTS *v.* UNITED STATES AND U.S. INTERNATIONAL TRADE COMMISSION, AND THE BUDD CO., DEFENDANTS-APPELLANTS

Appeal No. 90-1085, 90-1086, and 90-1087

(Decided September 6, 1990)

Christopher Dunn, of Willkie Farr & Gallagher, Washington, D.C., argued for plaintiffs/cross-appellants. With him on the brief were *William H. Barringer* and *Daniel L. Porter*.

George Thompson, *Lyn M. Schlitt*, General Counsel, and *James A. Toupin*, Assistant General Counsel, of the U.S. International Trade Commission, Washington, D.C., argued for defendant-appellant United States.

Matthew T. McGrath, of Barnes, Richardson & Colburn, Washington, D.C., argued for defendant-appellant The Budd Company. Of counsel on the brief were *James H. Lundquist* and *Peter A. Martin*, of Barnes, Richardson & Colburn, and *Herman Foster*, Associate General Counsel, The Budd Company.

Appealed from: U.S. Court of International Trade.
Judge CARMAN.

Before MARKEY* and LOURIE, *Circuit Judges*, and BROWN, *District Judge***.

LOURIE, *Circuit Judge*.

This case is an interlocutory appeal from an order of the Court of International Trade; it concerns the authority and power of the International Trade Commission to reconsider a determination it has made under the federal antidumping laws when directed to do so by that court. Because we conclude that the court did not err as a matter of law, we affirm its decision.

BACKGROUND

The facts of this case have been more fully set forth in *Borlem S.A. – Empreedimentos Industriais v. United States*, 718 F.Supp 41 (CIT 1989), and are partially repeated here for convenience. On May 23, 1986, the defendant-appellant Budd Company filed antidumping petitions with the Department of Commerce and the International Trade Commission on behalf of the United States industry producing tubeless steel disc wheel products (TSDWs). The petitions alleged that Brazilian

*Circuit Judge Markey vacated the position of Chief Judge on June 27, 1990.

**District Judge Garrett E. Brown, Jr. of the United States District Court for the District of New Jersey, sitting by designation.

manufacturers, of which there were only two, Borlem S.A.—Empreedimentos Industriais (Borlem) and FNV—Veiculos E Equipamentos S.A. (FNV), were importing TSDWs into the United States and selling them at less than fair value (LTFV) within the meaning of the federal antidumping laws, 19 U.S.C. § 1673 (1980) et seq., and that an industry in the United States was materially injured or threatened with material injury by reason of these imports.

On March 13, 1987, Commerce (International Trade Administration) found that the LTFV dumping margins were 15.25% for Borlem and 19.93% for FNV. The International Trade Commission (ITC) subsequently determined that an industry in the United States was threatened with material injury by reason of these imports.

Commerce then issued an antidumping duty order and an amendment to its final LTFV determination correcting certain clerical errors.

Borlem and FNV commenced two actions on May 28, 1987, in the Court of International Trade, one challenging the final LTFV determination by Commerce and the other challenging the final injury determination by the Commission. The latter is this case. On June 15, 1988, the court, at the request of Commerce, remanded the final LTFV determination and antidumping duty order to Commerce with instructions to recalculate the dumping margins and to correct all clerical, methodological and transcription errors.

The remand resulted in a second-amended final LTFV determination and amended antidumping duty order. The second-amended final LTFV determination found Borlem to have an LTFV dumping margin of 10.84% and FNV, a margin of 0.04%. Commerce deemed FNV's margin to be *de minimis* and excluded it from its amended antidumping duty order.

On March 22, 1989, at the request of the Commission in this case, the court, pursuant to its power to remand under 28 U.S.C. § 2643(C)(l) (1988)[1], remanded the matter to the Commission. The court instructed the Commission to decide whether it should reconsider its injury determination in light of Commerce's Second-Amended Final Determination.

In accordance with that remand, the Commission reported to the court that it had no authority to undertake reconsideration of its decision except for the process provided for under 19 U.S.C. § 1675 (1980) (Section 751 of the Tariff Act of 1930) which was not applicable in the circumstances. The Vice Chairman of the Commission, Ronald A. Cass, dissented from this determination noting that "[t]he error that has apparently been made, and rectified, by the Department of Commerce is by no means a trivial one," also indicating that the record suggests at least "a very strong possibility that the error was outcome determinative." *Tubeless Steel Disc Wheels From Brazil*, USITC Pub. No. 2179

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[1] 28 U.S.C. § 2643(C)(l) provides:

> Except as provided in paragraphs (2), (3), (4), and (5) of this subsection, the Court of International Trade may, in addition to the orders specified in subsections (a) and (b) of this section, order any other form of relief that is appropriate in a civil action, including, but not limited to, declaratory judgments, orders of remand, injunctions, and writs of mandamus and prohibition.

(Views on Remand in Inv. No. 731-TA-355) at 22. The court subsequently held that the Commission, upon a remand from the court, has the power to reconsider its determination and that the exercise of such power is discretionary on the part of the Commission. The court, accordingly, remanded once more and instructed the Commission that if it decided not to reconsider its determination, it should set forth its reasons. *Borlem S.A. – Empreedimentos Industriais v. United States*, 718 F.Supp. at 42.

Subsequently, the Commission and Budd moved under 28 U.S.C. § 1292(d)(1) (1982)[2] for an interlocutory appeal of that order. On September 1, 1989, the court granted the defendants' motions to amend and stay the order and plaintiffs' cross-motion to certify an additional question for appeal and certified the following interlocutory questions:

(1) whether or not the International Trade Commission has the authority and power to reconsider its final affirmative threat of injury determination, when directed to do so by this court pursuant to its remand authority under 28 U.S.C. § 2643(c)(1) in light of the International Trade Administration's amended final determination of sales at less than fair value and amended antidumping duty order; and

(2) whether or not the exercise of such power or authority of reconsideration on remand by the Commission is discretionary.

In accordance with the requirements of the statute, Judge Carman included in his order of September 1, 1989, the necessary statement permitting this appeal, and this court permitted the appeal to be taken in its order of October 26, 1989.

DISCUSSION

This court has jurisdiction of this appeal under 28 U.S.C. § 1292(d)(1). The issues in this case are those certified to this court by the trial court. We review the decision of the court as a question of law.

THE FIRST QUESTION

The first question before us is whether the trial court erred in deciding under 28 U.S.C. § 2643(c)(1) that the International Trade Commission has the authority and the power on remand to reconsider its determination that the TSDW industry in the United States was threatened with material injury by reason of LTFV imports from Brazil in light of Commerce's Second-Amended Final Determination. As was stated by Judge Carman, the Court of International Trade has broad authority under 28 U.S.C. § 2643(c)(1) to require the Commission to reconsider its actions. At the time of enacting 28 U.S.C. § 2643(c)(1), the House Committee on the Judiciary stated that "[this subsection] is a general grant of authority for the Court of International Trade to order any form of relief that it

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[2] 28 U.S.C. § 1292(d)(1) provides in pertinent part:

> when any judge of the Court of International Trade * * * includes in [an interlocutory] order a statement that a controlling question of law is involved with respect to which there is a substantial ground for difference of opinion and that an immediate appeal from that order may materially advance the ultimate determination of the litigation, the United States Court of Appeals for the Federal Circuit may, in its discretion, permit an appeal to be taken from such order * * *.

deems appropriate under the circumstances." H.R. Rep. No. 96-1235, 96th Cong., 2d Sess. 44, 61 (1980), *reprinted in* U.S. Code Cong. & Admin. News 1980, 7088, 7114. The Committee went on to state further that "[i]t is the Committee's intent that this authorization be deemed to grant the Court of International Trade remedial powers co-extensive with those of a federal district court." *Id.*

This court recently stated in *Rhone Poulenc, Inc. v. United States*, 880 F.2d 401, 402 (Fed. Cir. 1989) that "[the Court of International Trade] is a national court under Article III of the Constitution" and noted that the legislative history of 28 U.S.C. § 1585 (1980)[3] provides the Court of International Trade "with all the necessary remedial powers in law and equity possessed by other federal courts established under Article III of the Constitution." *Id.* (citing H.R. Rep. No. 96-1235, 96th Cong., 2d Sess. 18-20 (1980), *reprinted in* 1980 U.S. Code Cong. & Admin. News 3729-3731) .

Appellant ITC challenges this decision on several grounds. First, it asserts that its interpretation of the antidumping law is entitled to great judicial deference and is reasonable. It states that the question for the trial court was whether the Commission's interpretation is "sufficiently reasonable" to be acceptable to a reviewing court, *Zenith Radio Corp. v. United States*, 437 U.S. 443, 450 (1978), and it argues that its interpretation was reasonable.

We believe that the trial court gave appropriate deference to the Commission, but arrived at the correct conclusion. It noted its obligation to give substantial weight to an agency's interpretation of a statute it administers, but felt it could not defer to an interpretation of the law where there are compelling indications that that interpretation is incorrect.[4] It concluded that the Commission's assertion that it lacks power to reconsider its final determination on judicial remand is unreasonable and an impermissible construction of the statute.

We agree with the trial court's interpretation of its powers and believe that Congress' desire for speedy determinations on dumping matters should not be interpreted as authorizing proceedings that are based on inaccurate data. The remand authority given to the court by 28 U.S.C. § 2643(c)(1) demonstrates Congress' concern that the court have appropriate authority in trade cases to deal with the issues that come before it. The fact that, based on the second-amended determination, FNV was shown not to be dumping beyond a *de minimis* amount was of sufficient importance that the Commission might have determined that there was no material injury or threat of injury at all. It is understandable and justifiable that the court might wish to remand such a case.

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[3] 28 U.S.C. § 1585 states that "the Court of International Trade shall possess all the powers in law and equity of, or as conferred by statute upon, a district court of the United States."

[4] We also note that 28 U.S.C. § 2643(b) (1980) also explicitly provides that when "the Court of International Trade is unable to determine the correct decision on the basis of the evidence in any civil action, the court * * * may order such further administrative or adjudicative procedures as the court considers necessary * * *." Since the trial court did not premise its authority on this provision, we will comment on it no further other than to indicate its possible applicability to this case. *See Jarvis Clark Co. v. United States*, 739 F.2d 628, 629, 2 Fed. Cir. (T) 97, 98 (Fed. Cir. 1984).

A court is indeed obligated to give deference to an agency acting within its scope of responsibility. However, deference is not owed to a determination that is based on data that the agency generating those data indicates are incorrect. The law does not require, nor would it make sense to require, reliance on data which might lead to an erroneous result.

Moreover, such deference should not apply when the issue is the legal scope of an agency's authority. *See Social Sec. Bd. v. Nierotko*, 327 U.S. 358, 369 (1946). Also, deference does not require relinquishment of responsibility. The trial court did give consideration and respect to the Commission's views. It did not finally agree with them. We do not think that was error. Reconsideration pursuant to court remand order seems clearly within the compass of section 2643(c)(1), provided the directions to the Commission do not contravene the statute or improperly infringe on the decision-making authority of the agency.

The Commission also argued that the antidumping statute requires it to base its determination on Commerce's original determination. It relies on the language of 19 U.S.C. § 1673d(b)(1) (1980) which provides that "the Commission shall make a final determination * * * with respect to which the administering authority has made an affirmative determination under subsection (a)(1) of this section." It interprets that section as limiting the right of the Commission to make a determination of injury based only on a Commerce determination made within the timetable of section 1673d(a) (1980).

We appreciate the Commission's desire to adhere to the time requirements of the statute. Nonetheless, we do not believe the trial court erred in considering that it had the authority to order a redetermination outside of that time frame. Congress clearly wanted prompt consideration of antidumping petitions and it set out a formula for the Commission and Commerce to accomplish that goal. The statute, however, says nothing about redeterminations. It does not provide for them, nor does it forbid them. Redetermination of an injury finding on remand by a court in no way interferes with the statutory scheme. Indeed, the Commission's interpretation would be inconsistent with other parts of the statute providing for judicial review. *See* 19 U.S.C. § 1516a (1988).

The Commission has noted that the Omnibus Trade and Competitiveness Act of 1988 granted Commerce the power to correct ministerial errors in its final determination within a reasonable time of their issuance. *See* 19 U.S.C. § 1671d(e), 1673d(e). It reasons from this that Congress clearly intended the Commission not to have post-determination alteration power. That argument is not persuasive. A provision permitting one agency to correct ministerial errors is not tantamount to the preclusion of another agency correcting substantive errors.

The Commission criticizes the trial court's citation of 19 C.F.R. § 207.46 (1989), which states, "nothing in § 207.45 (the regulation implementing Section 751 of the Act) shall limit the inherent authority of the Commission to issue an appropriate modification, clarification, or correction of a determination within a reasonable time of its issuance,"

for inherent authority by the Commission to reconsider its determination. The Commission states that this regulation has been used solely to correct typographical and other non-substantive errors.

We do not read the Commission's regulation as narrowly as it seems to read it. The language "modification, clarification, or correction" would appear to provide authority to redetermine an injury finding. The fact that the regulation has only been used for non-substantive corrections in the past should not preclude it from being used more broadly within its terms when appropriate. However, it is not necessary here to interpret the Commission's own regulation. The issue before us is the court's authority to require the Commission to act, not the Commission's right to act under its own rules.

The Commission also argues that its reconsideration as ordered by the trial court would interfere with the statutory division of responsibility between Commerce and the Commission that avoids the possibility of one agency questioning a decision of the other. The Commission's position is not well taken. Redetermination on remand in this case in no way amounts to sanction for one agency on its own to second-guess another agency. Commerce itself has stated that its earlier determination of margin was in error. By making its redetermination, the Commission is obviously not meddling in Commerce's work. The latter, in making its own redetermination, had to expect that it would be the basis for a Commission redetermination.

The Commission posits a variety of administrative costs and burdens that would result if it were required to make a redetermination as ordered by the trial court. We do not minimize these concerns or even attempt to evaluate them. Suffice it to say that the Commission had the opportunity to raise its concerns with its reviewing court and the latter felt they did not predominate over the need for accuracy. We do not believe that was legal error. The trial court's right to order a reconsideration is not to be confused with the wisdom of its decision to do so.

The Commission is concerned with an "endless *renvoi*," noting that the second-amended Commerce determination is on appeal at the trial court. Its point is a thoughtful one, questioning whether it should be basing a new determination on data that may possibly be thrown out. Once again, that was a matter that the trial court should or could have been apprised of and we do not consider the court's decision to be legal error. The Commission notes cases where there exists the possibility of having to make multiple determinations in a case, thereby frustrating Congress' desire for expedition. We note that this case has already been to the Commission's reviewing court for three decisions. Expedition would thus seem to encourage the use of judicial authority to cause the involved agencies to make any needed determinations promptly, rather than to decline to act on the basis of an asserted lack of authority on the part of the reviewing court. Moreover, expedition is not the only value needed in the implementation of the statute; accuracy is also important. In any

event, the possibility of multiple determinations by the Commission does not lead to a conclusion of error by the trial court.

The Commission also asserts that Section 751(b) of the Tariff Act of 1930, 19 U.S.C § 1675(b) (1980), provides the only basis for the Commission to revisit its determinations based on subsequent events. Regardless of this perceived limitation on the Commission's own authority, Section 751(b) does not restrict the court's authority where the court decides that a determination properly under review is based on erroneous data.

The Commission has strongly argued that the trial court erred in utilizing evidence outside "the record," which is statutorily defined as "all information presented to or obtained by the Commission during the course of the administrative proceeding * * * and a copy of * * * all notices published in the Federal Register." 19 U.S.C. § 1516a(b)(2) (1979). Legislative history is quoted to the effect that the court is not to conduct a trial *de novo*. The Commission is correct regarding affirmance or reversal of a ruling under review. However, a reviewing court is not precluded under this standard from considering events which have occurred between the date of an agency (or trial court) decision and the date of decision on appeal. Where such intervening events are properly brought to the attention of the reviewing court, that court may rely on that occurrence and typically will remand for consideration by the decision-maker. *Cf. 7 Moore's Federal Practice* § 60.26[3] 1990.

The Commission's reliance on *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519 (1978), is thus misplaced. In *Vermont Yankee*, the Supreme Court held that the reviewing court exceeded its power of review when it imposed on an agency certain procedural requirements not mandated by statute, and it improperly intruded into the agency's decision-making authority.

The situation here is significantly different because we have an incorrect fact determination, corrected by the governmental agency that issued it, while the appeal was pending, which determination when properly considered, may lead to a different result. It is quite a different matter from *Vermont Yankee* for the court to remand for reconsideration by an agency of a corrected fact determination by a sister agency whose data provide the raw material for its own determination. *Vermont Yankee* does not preclude remand where the decision under review rests on an erroneous fact.

Appellant Commission asserts that in *Freeport Minerals Co. v. United States*, 758 F.2d 629, 3 Fed. Cir. (T) 114 (Fed. Cir. 1985), this court, in stating that Congress has not granted the Court of International Trade authority to assume control of an agency case regardless of the statutes which the agency must follow, *Id.* at 636, 3 Fed. Cir. (T) at 122, precluded the directive in the remand by the lower court in this case. We discern no overreaching by the trial court here. A directive to the Commission to reconsider in light of the intervening correction by Commerce is no different from a reversal and remand for reconsideration because a fact relied on is unsupported by the evidence.

The Commission has also criticized the use of judicial notice by the trial court. It conceded that if it were relevant to this proceeding, the second-amended determination is the type of fact of which judicial notice could be taken. The Commission felt it was not relevant presumably because it was not on the record compiled by the Commission. The short answer to this point is that the new determination is on the record, having been published in the Federal Register. Moreover, we believe it is circular reasoning to state that a fact cannot be judicially noticed unless it is so established by being on the record, that judicial notice is not necessary. Rather than this court or the trial court deciding on the accuracy or significance of these new data, all we are doing is recognizing that new data exist that the Commission should evaluate. Thus, the trial court did not err in taking judicial notice of the Second-Amended Final Determination.

Finally, the Commission asserts that the court erred in granting a remedy that is contrary to the statute. It argues that 28 U.S.C. § 2643(c)(1), the remand provision, only applies within the scope of judicial review, which is limited to the administrative record. It cites *NTN Bearing Corp. of America v. United States*, 892 F.2d 1004 (Fed. Cir. 1989), for the proposition that the power of the trial court may not be used to create a right, but only to enforce an existing right.

NTN is not pertinent to the issue on appeal. In that case, the question was whether the trial court's issuance of an injunction was correct after grant of partial summary judgment. This court's holding that the trial court exceeded its powers was based on the express limitation of a statute. No similar restriction on the court's remedial authority exists here.

Appellant Budd makes arguments similar to those of the Commission. One particular point raised by Budd relates to the trial court's taking judicial notice of the second-amended Commerce determination, stating that the use of judicial notice is properly applied only to facts not subject to reasonable dispute. They note that the accuracy of that determination is now under review by the trial court.

It is of course possible that the trial court could modify the second-amended Commerce determination. If that occurred, then the parties could consider how to proceed in the face of that new fact. In the present circumstances, however, what the trial court has now taken judicial notice of is not the new margin determinations themselves, but the fact that a new and different determination has been made based on the premise that the earlier one was incorrect. That action, by the same government agency that generated the first determination, certainly seems to us to be a fact of which judicial notice may be taken.

Budd also argues that this case is not ripe for decision by the trial court since the accuracy of the second-amended determination has not been finally adjudicated.[5] It is concerned that a game of procedural "ping-pong" might result if the Commission acts on the basis of a margin determination that itself is under challenge. However, it is for the trial

[5]On September 22, 1988, Budd filed an action with the Court of International Trade contesting the second-amended final LTFV and antidumping determinations.

court in reviewing the action (or nonaction) of the Commission to consider whether a stay pending the court's own decision on appeal of the second-amended determination is appropriate; that may well be a sensible course of action. We merely review the legal propriety of the Court of International Trade's actions and we do not find any legal error to have been committed in its remand.

Appellees have cited several cases for the proposition that the Commission may reconsider a decision based on later-discovered evidence that a first determination was premised on incorrect data. In *Badger-Powhatan v. United States*, 633 F. Supp. 1364, 10 CIT 241, *appeal dismissed*, 808 F.2d 823 (Fed. Cir. 1986), the Court of International Trade held that an International Trade Commission subsequent final injury determination rendered the Commerce Department's earlier final LTFV determination erroneous and ordered Commerce to amend its final LTFV determination. The Commission here argues that *Badger-Powhatan* is inapplicable to the present situation in that its holding was premised on the fact that the error there could have been corrected during the statutory period provided. Appellee argues that *Badger-Powhatan* is "precisely analogous" to the present case. We do not need to decide how precisely analogous *Badger-Powhatan* is to our case, but believe that the fact that the error could have been corrected earlier should be irrelevant since the governing fact in *Badger-Powhatan* was the presence of error which the trial court felt the agency (Commerce) should correct. That is the case here.

In *Sprague Electric Co. v. United States*, 488 F. Supp. 910 (1980), 84 Cust. Ct. 243, the Customs Court remanded the case to the Commission when it was discovered that the official import statistics on which the Commission had relied were incorrect. The Commission argues that *Sprague* is not on point because the Commission in that case had been alerted to a possible inaccuracy in the data during its investigation. We are not persuaded by this argument, however, since we are considering here the power of the Court of International Trade to remand for reconsideration, and the fact that the Commission might have been warned of a possible inaccuracy in its data hardly constitutes a meaningful distinction over a case where it was not warned. A decision based on inaccurate data provides a sound reason for a court to order reconsideration to correct a determination based on those data, whether the Commission knows of the incorrect data or not.

Finally, *Alberta Gas Chems. Ltd v. Celanese Corp.*, 650 F.2d 9 (2d Cir. 1981), is argued by appellee to be relevant. In that case the issue was whether to remand the matter to the Commission to determine whether, as subsequently alleged, the original dumping determination was tainted with perjury. The Second Circuit did remand, and appellant Commission here asserts that that case is distinguishable, being based on the need for an agency to ensure the integrity of its own processes. While that was clearly an important factor in *Alberta*, the relevant factor for us is that the appellate court had and exercised the power to remand

for a redetermination based on facts discovered after the appeal. Fraud may be more egregious than mere error, but this court sees no legal error in the Court of International Trade having exercised its power to correct an error uncovered after appeal that is based on other than fraud.

THE SECOND QUESTION

The second question certified for consideration by this court is whether the exercise of the power or authority of reconsideration on remand by the International Trade Commission is discretionary. First, we note that the trial court did make its order discretionary in ordering the Commission to consider *whether* in its discretion it should reconsider its final determination. To the extent that we have concluded that the court has the authority to order the Commission to reconsider, we see no reason why it should lack authority to order the Commission to exercise discretion in considering whether to make a redetermination. The briefs of appellants do not argue that discretion should not be granted because they consider the trial court entirely lacked power to require the Commission to make a redetermination; appellees, on the other hand, consider the trial court erred in giving the Commission that discretion. They believe it should have been required to make a redetermination.

As indicated above, we are aware of no reason why the trial court lacked the power to give the Commission discretion on remand. On the other hand, we fail to understand why it did give the Commission leeway. It seems apparent that the Commission is unwilling to conduct a redetermination unless ordered to do so, and, if the trial court felt that the new Commerce Department data justified its intervention in the resolution of this dumping proceeding, one would think that it justified requiring the Commission to make the redetermination rather than asking it again to use its discretion. While we see no legal error in the trial court's determination on this point, we recommend on remand that the court itself reconsider whether it wishes to provide discretion to the Commission.

We have considered the other arguments raised by appellants concerning the issues on appeal and do not find them persuasive in asserting that the trial court committed error.

In summary, we answer the first of the certified questions in the affirmative and the second with a qualified affirmative, and we remand for further proceedings consistent with this decision.

COSTS

Costs to appellees.

AFFIRMED AND REMANDED

United States Court of International Trade

One Federal Plaza

New York, N.Y. 10007

Chief Judge

Edward D. Re

Judges

James L. Watson
Gregory W. Carman
Jane A. Restani
Dominick L. DiCarlo
Thomas J. Aquilino, Jr.
Nicholas Tsoucalas
R. Kenton Musgrave

Senior Judges

Morgan Ford

Herbert N. Maletz

Bernard Newman

Samuel M. Rosenstein

Nils A. Boe

Clerk

Joseph E. Lombardi

Decisions of the United States Court of International Trade

(Slip Op. 90–88)

NTN BEARING CORP. OF AMERICA, AMERICAN NTN BEARING MANUFACTURING CORP., AND NTN TOYO BEARING CO., LTD., PLAINTIFFS *v.* UNITED STATES, DEFENDANT, AND TIMKEN CO., DEFENDANT-INTERVENOR

Court No. 87-11-01066

Plaintiffs challenge the final affirmative dumping determination by the Department of Commerce, International Trade Administration. Plaintiffs allege that Commerce unlawfully included tapered roller bearing components within the scope of its investigation. Additionally, plaintiffs maintain that Commerce's determination is further marred by numerous errors.

Held: The Court finds that Commerce acted reasonably in deciding to include tapered roller bearing components within the scope of its investigation. The case is remanded to the ITA for reconsideration of certain other calculations.

[Plaintiffs' motion for judgment on the agency record denied: case remanded.]

(Dated September 7, 1990)

Barnes, Richardson & Colburn (*Robert E. Burke, Donald J. Unger* and *J. Kevin Horgan*) for plaintiffs.

Stuart M. Gerson, Assistant Attorney General: *David M. Cohen*, Director, Commercial Litigation Branch, Civil Division, United States Department of Justice (*Velta Melnbrencis*): of counsel: *Stephanie J. Mitchell*, Attorney-Advisor, Office of Chief Counsel for Import Administration, Department of Commerce, for defendant.

Stewart & Stewart (*Eugene L. Stewart, Terence P. Stewart, James R. Cannon* and *John M. Breen*); of counsel: *Scott A. Scherff*, Senior Corporate Counsel, The Timken Company, for defendant-intervenor.

OPINION

TSOUCALAS, *Judge*: This action is presently before the court on plaintiffs', NTN BEARING CORPORATION of AMERICA, AMERICAN NTN BEARING MANUFACTURING CORPORATION and NTN TOYO BEARING COMPANY, LTD. (collectively "NTN"), motion, pursuant to Rule 56.1 of the Rules of this Court, for judgment on the agency record as to Counts II through VI of its complaint as supplemented. The court's jurisdiction is predicated upon 28 U.S.C. § 1581(c).[1]

Plaintiffs challenge the legality of the antidumping determination published by the United States Department of Commerce, International

[1] 28 U.S.C. § 1581(c) (1982) provides in pertinent part:

The Court of International Trade shall have exclusive jurisdiction of any civil action commenced under section 516A of the Tariff Act of 1930.

Trade Administration ("ITA" or "Commerce") on August 17, 1987. *Final Determination of Sales at Less Than Fair Value; Tapered Roller Bearings and Parts Thereof, Finished and Unfinished, From Japan*, 52 Fed. Reg. 30,700, *amended*, 52 Fed. Reg. 47,955 (Dec. 17, 1987). Plaintiffs charge that the ITA's calculations are significantly flawed and that the final antidumping determination is not supported by substantial evidence in the administrative record, and specifically allege the following:

1. the ITA should not have included tapered roller bearing ("TRB") component parts within the scope of its investigation;
2. the ITA erred in not applying the "special rule" provided in 19 C.F.R. § 353.56(b) (1987) when computing its currency conversion rate;
3. the ITA failed to select the most similar merchandise when conducting its fair market value ("FMV") calculation;
4. the ITA's computed exporter's sales price ("ESP") reflected an improper calculation of NTN's depreciation expenses;
5. the ITA unlawfully deducted direct United States selling expenses from exporter's sales price;
6. the ITA's practice in determining whether or not to consider sales below cost is contrary to law;
7. the ITA's calculation of fair market value for individual cups and cones by "splitting" unitary set prices in the home market is unlawful;
8. the ITA should have made a circumstance of sale adjustment to fair market value for warehouse expenses incurred by NTN;
9. the ITA unlawfully included sales not made "in the usual commercial quantities" in the home market sales it considered;
10. the ITA unlawfully included general and administrative expenses in its cost of production calculation;
11. the ITA understated the level of trade adjustment to fair market value; and
12. the ITA failed to include warehouse expenses in the ESP offset pool.

Commerce refutes plaintiffs' contentions except that it concedes the inadvertent exclusion of certain pertinent data in the ITA's calculation of ESP offset pool. Consequently, Commerce maintains, the case should be remanded to the ITA to correct this error. Defendant-intervenor opposes plaintiffs' motion as well as Commerce's request for remand. For the reasons detailed below, the Court finds that this case must be remanded to the ITA so that appropriate corrections can be made to the dumping calculations.

Background

In response to a petition filed by The Timken Company on behalf of the domestic industry, the ITA initiated an antidumping investigation of all tapered roller bearing imports from Japan not already subject to an existing dumping order. *Tapered Roller Bearings and Parts Thereof, Finished and Unfinished, From Japan; Initiation of Antidumping Duty Investigation*, 51 Fed. Reg. 33,286 (Sept. 19, 1986). The ITA completed its investigation and determined that certain Japanese importers, in-

cluding plaintiffs herein, were engaging in sales of TRBs in the United States at less than fair value ("LTFV"). 52 Fed. Reg. 30,700. The International Trade Commission ("Commission") further determined that a domestic industry was materially injured or threatened with material injury as a consequence of said sales. *Tapered Roller Bearings and Parts Thereof, and Certain Housings Incorporating Tapered Rollers From Japan*, USITC Pub. 2020 (1987). The imported TRBs and parts thereof were therefore made subject to an antidumping duty order.

On December 3, 1987, NTN instituted this action challenging certain aspects of Commerce's final determination. Pending disposition of the case, however, the ITA reviewed its calculations and issued an amended final determination on December 17, 1987. *Amendment to Final Determination of Sales at Less Than Fair Value and Amendment to Antidumping Duty Order; Tapered Roller Bearings and Parts Thereof, Finished and Unfinished, From Japan*. 52 Fed. Reg. 47,955. Thus, the Court permitted plaintiffs to file a supplemental complaint incorporating any changes prompted by the ITA's amendment.

By the instant motion, plaintiffs move for judgment on the agency record as to Counts II through VI of the complaint as supplemented. Count I of the complaint was adjudicated separately and is, therefore, not considered herein.

Plaintiffs come before the court pursuant to 19 U.S.C § 1516a(a)(2)(1982). As such, the applicable standard of review is whether Commerce's actions were supported by substantial evidence and otherwise in accordance with law. *See* 19 U.S.C. § 1516a(b)(1)(B); *Toho Titanium Co. v. United States*, 11 CIT 160, 164, 657 F Supp. 1280, 1283 (1987).

Discussion

1. *Scope of the Investigation:*

A TRB consists of various components which are combined to create the finished bearing. When Commerce investigated TRB imports from Japan, it included within the scope of its investigation plaintiffs' imports of TRB component parts.[2] Commerce calculated a United States price for the components by "taking the sale price of the completed TRBs and attributing a portion of that price to the imported parts" and found these itemized prices to be at less than fair value. *Defendant's Memorandum in Opposition to Plaintiffs' Motion for Judgment on the Agency Record as to Counts II Through VI of Their Complaint as Supplemented ("Defendant's Memo")* at 8-9. Consequently, when Commerce issued its final affirmative antidumping duty determination, TRB component parts imported by NTN became subject to antidumping duties.

Plaintiffs allege that because their imports of TRB components are used colely to supply their subsidiary, AMERICAN NTN BEARING MANUFACTURING CORP., Commerce unlawfully included the TRB components within the scope of its investigation. NTN contends that

[2]The undisputed record reveals that these components are used in the manufacture of TRBs by NTN's subsidiary at its plant in Elgin, Illinois. The finished TRBs *are* sold in the United States.

since the imported components were simply transferred intracompany, no actual *sales* of components occurred in the United States. In the absence of a "sale of imported merchandise," plaintiffs maintain, the antidumping laws of this country are not invoked. *Plaintiffs' Memorandum in Support of Their Motion for Judament on the Agency Record As to Counts II Throuah VI of Their Complaint As Supplemented ("Plaintiffs' Memo")* at 10.

Commerce, in turn, claims it was compelled to include TRB component parts imported within the scope of its investigation because they were specified in the petition. Additionally, Commerce maintains that TRB component parts are properly included in the antidumping determination because "[i]f plaintiffs' argument were accepted, then all foreign manufacturers could circumvent the application of the antidumping law by establishing finishing operations in the United States by one of their subsidiaries and 'transferring' the unfinished product to their subsidiaries for completion and subsequent resale. *Defendant's Memo* at 10.

Procedures for the initiation of antidumping duty investigations are outlined in 19 U.S.C. § 1673a (1982 & Supp. V 1987), whereby the administering authority is required to commence an antidumping investigation whenever an interested party (as defined by the statute) files an adequate petition alleging the necessary elements. Upon receipt of such a petition, the ITA's role in examining its sufficiency is limited to a ministerial function.*Republic Steel Corp. v. United States*, 4 CIT 33, 35, 544 F. Supp. 901, 904 (1982).

> The law states that [the ITA] shall determine only two things, first "whether the petition alleges the elements necessary for the imposition of a duty under section 701(a)" [19 U.S.C. § 1671(a)] and second, whether the petition "contains information reasonably available to the petitioner supporting the allegations."

Id. If the petition is deemed sufficient, the ITA is statutorily obliged to insure that the proceedings are maintained in a form which corresponds to the petitioner's clearly evinced intent and purpose. *Mitsubishi Elec. Corp. v. United States*, 12 CIT ____, 700 F. Supp. 538 (1988), *aff'd*, 898 F.2d 1577 (Fed. Cir. 1990).

In the instant action, The Timken Company filed with the ITA a comprehensive petition requesting it to investigate completed TRBs imported from Japan, as well as unfinished TRBs and parts thereof. A.R. Doc. 1.[3] Against this backdrop, then, Commerce maintains that it was compelled to administer its investigation in strict accordance with the

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[3]The Timken Company's petition is replete with references indicating its intention that TRB parts be included within the scope of the investigation:

> (i) The merchandise covered by this petition is all tapered roller bearings, tapered rollers and other parts thereof (both finished and unfinished) including, but not limited to, single-row, multiple-row (e.g., two-, four-), and thrust bearings and self-contained bearing packages (generally pre-set, pressealed, and pre-greased), * * *. A.R. Doc. 1 at 7.
>
> (v) Subject to this petition are the complete bearing (cone assembly and cup in sets), cups alone, cone assemblies alone, and the parts of tapered roller bearings (cones, rollers, retainer or cage), whether finished or unfinished. A.R. Doc. 1 at 9.
>
> [U]finished components * * * should also be considered within the scope of this petition for an investigation. A.R. Doc. 1 at 12.

petition. The Court is not prepared, however, to divest Commerce of the broad discretion it has traditionally been afforded. *See Mitsubishi*, 700 F. Supp at 552.

The very language of the statute prescribes that a "petition may be amended at such time, and upon such conditions, as the administering authority and the Commission may permit." 19 U.S.C. § 1673a(b)(1). Where congressional intent is unambiguously stated in the language of the statute, further inquiry is unnecessary. *Brookside Veneers, Ltd. v. United States*, 847 F.2d 786, 788 (Fed Cir. 1988), *cert. denied*, 488 U.S. 943, 109 S. Ct. 369 (1988).

This court has repeatedly opined that the ITA has inherent authority to define the scope of an antidumping duty investigation. *Diversified Prod. Corp. v. United States*, 6 CIT 155, 159, 572 F. Supp. 883, 887 (1983); *accord, Royal Business Machines, Inc. v. United States*, 1 CIT 80, 507 F. Supp. 1007 (1980), *aff'd*, 669 F.2d 692 (1982). Necessarily then, had the ITA determined the petition to be overly broad, or insufficiently specific to allow proper investigation, or in any other way defective, it possessed inherent authority to redefine and clarify the parameters of its investigation. *The Torrinaton Co. v. United States*, 14 CIT____, Slip Op. 90-73 (August 3, 1990). Consequently, the Court rejects Commerce's assertion that it was obliged to accept the scope set forth by Timken's petition.

Nevertheless, Commerce, as the administering agency, is entrusted to safeguard domestic industries from unfair trading practices by foreign manufacturers. 19 U.S.C. § 1673. All too often, however, foreign manufacturers effectively emasculate our dumping laws by employing inventive import strategies. Circumvention of antidumping orders by way of establishing finishing operations in the United States has posed a particularly persistent problem for the agency.

Congress has long acknowledged the injurious potential of this situation and manifested its intent to preclude foreign importers from circumventing our trade laws. S. Rep. No. 1298, 93rd Cong., 2d. Sess. 169, *reprinted in* 1974 U.S. Code Cong. & Admin. News 7306. Accordingly, Congress has attempted to thwart importers' circumvention strategies by enacting legislation intended to "send a clear message to foreign producers and trading partners that we will actively seek to prevent circumvention of our trade laws, and thereby decrease the incentive foreign producers might have to 'finesse' their way around our trade laws, in order to engage in recognized unfair trade practices." S. Rep. No. 71, 100th Cong., 1st Sess. 135 (1987). Section 1321 of the Omnibus Trade and Competitiveness Act of 1988 (OTCA) is clearly intended to provide Commerce with the discretion necessary to allow it to enforce our trade laws effectively. H. Rep. No. 40, 100th Cong., 1st Sess. 100 (1987).

In the case at bar, plaintiffs maintain that since what is cold in the United States is the completed TRB and not the components, they cannot be subject to the dumping laws. *Plaintiffs' Memo* at 10. Plaintiffs' argument is predicated on the mistaken premise that the TRB components are discrete from the completed bearings which *are* covered by the inves-

tigation. The imported components at issue constitute the sole input for the finished TRBs,[4] which compete with the domestic industry and, yet, are excluded from the purview of our dumping regulations by reason of a finishing operation performed in the United States.

NTN's TRB components are generally made of a steel alloy which has been substantially transformed into the various parts. These prefabricated components have no independent application other than to be combined and further refined into complete TRBs.[5] This process of completion, although resulting in a distinct downstream product, does not constitute a transformation of the parts, *i.e.*, TRB component parts are *not* subsumed into a new article of commerce, they are merely further refined.

It is apparent to the Court that the situation herein exemplifies the classic circumvention schemes that hinder effective enforcement of our antidumping legislation. This Court, however, will not condone the circumvention of our dumping laws merely by the utilization of ingenious import technigues. *Gold Star Co. v. United States*, 12 CIT ___, ___, 692 F. Supp. 1382, 1385 (1988), *aff'd sub nom. Samsung Elec. Co. v. United States*, 873 F.2d 1427 (Fed. Cir. 1989). When, as in the case at bar, prefabricated components are imported for the exclusive purpose of finishing into a product that *would* be subject to a dumping order, thereby escaping dumping penalties, then the components are properly within the scope of the investigation and subsequent order. *Id.*

In light of Congress' expressed intent to discourage the practice of establishing finishing operations in the United States with the specific purpose of evading our trade laws and finding that to be the case herein, this Court holds that Commerce possessed discretionary authority to include plaintiffs' TRB component parts within the scope of its investigation.

2. *Currency Conversion Rate:*

Additionally, plaintiffs claim that Commerce unlawfully refused to apply the "special rule" exception provided for in 19 C.F.R. § 353.56(b) (1987) to calculate the currency conversion rate applicable in its comparison of fair market value and United States price.

In the event that differing currencies are involved in a transaction under investigation, Commerce determines the conversion rate to be used for comparison of United states price and foreign market value pursuant to 19 C.F.R. § 353.56:

> (a) *Rule for conversion.* In determining the existence and amount of any difference between the United States price and the fair value or foreign market value for the purposes of this part or of the Act, any necessary conversion of a foreign currency into its equivalent in United States currency shall be made in accordance with the provi-

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[4] The finished TRBs, produced at plaintiffs' Illinois plant, consist of outer rings, inner rings, retainers, seals and rollers, all of which are primarily produced in Japan. *Plaintiffs' Memo* at 9.

[5] Plaintiffs concede that the parts are manufactured for the exclusive purpose of supplying their Elgin, Illinois plant, and they are not sold as replacement parts. *Plaintiffs' Memo* at 8.

sions of section 522 of the Tariff Act of 1930, as amended (31 U.S.C. 372):

> (1) As of the date of purchase * * *; or
> (2) As of the date of exportation, if the exporter's sales price is an element of the comparison.

Section 522 of the Tariff Act of 1930, codified in 31 U.S.C. § 5151 (1982), prescribes that the Secretary of the Treasury shall determine the value of foreign currency changed into U.S. currency, for the quarter in which the products were exported. If, however, *inter alia* this rate varies more than five percent from the market rate on the day of export, the first buying rate for the foreign currency to be certified by the Federal Reserve Bank of New York shall be the applicable rate, provided that it doesn't vary more than five percent from the market rate on the day of export. 31 U.S.C. § 5151(b), (c), (d).

Section 353.56 of Commerce's regulations goes on to provide an exception to the currency exchange schedule set forth in section (a):

> (b) *Special rules for fair value investiaations.* For purposes of fair value investigations, manufacturers, exporters, and importers concerned will be expected to act within a reasonable period of time to take into account price differences resulting from sustained changes in prevailing exchange rates. Where prices under consideration are affected by temporary exchange rate fluctuations, no differences between the prices being compared resulting solely from such exchange rate fluctuations will be taken into account in fair value investigations.

This exception derives from the notion that the purpose of the antidumping laws

> would be ill-served by application of a mechanical formula to find LTFV sales, and thus a violation of the antidumping laws, where none existed. A finding of LTFV sales based on a margin resulting *solely* from a factor beyond the control of the exporter would be unreal, unreasonable, and unfair.

Melamine Chem., Inc. v. United States, 732 F.2d 924, 933 (Fed. Cir. 1984) (emphasis in original).

Pursuant to the procedure outlined by 19 C.F.R. § 353.56(a) and 31 U.S.C. § 5151, the ITA used the rates certified by the Federal Reserve Bank to compare United States price and FMV of the imported merchandise. *See* 52 Fed. Reg. at 30,703. Commerce determined NTN's final less than fair value ("LTFV") dumping margin to be 36.53%. 52 Fed. Reg. at 47,956. Plaintiffs rebut, however, that "a significant portion" of the dumping margins which Commerce attributed to it were generated by a sustained increase in the value of the Japanese yen ("yen") against the United States dollar ("dollar") during the period in Which the ITA investigated and compared NTN's foreign market value and United States

price. Consequently, plaintiffs assert, the ITA should have applied the "special rule" clause provided in 19 C.F.R. § 353.56(b) to abrogate the alleged false margins created by sudden currency shifts. *Plaintiffs' Memo* at 25.

Between September 1985 and August 1986 (encompassing the period during which Commerce conducted its investigation in this case), the yen experienced a forty percent increase in value against the dollar. *Plaintiff's Memo* at 19. The effect of such drastic exchange rate fluctuations is, theoretically, to decrease the dollar value (*i.e.*, the United States price) of Japanese products even though the "yen" price (*i.e.*, the home market price) remains unchanged. Thus, it is feasible that after an appreciable accretion in the value of the yen against the dollar, identically priced goods imported from Japan become lower priced in the United States than they are in the home market, thereby creating the illusion of sales at less than fair value.

"Congress has afforded Commerce considerable latitude and discretion in implementing the antidumping duty laws, especially during the investigative fair value phase. "*Melamine*, 732 F.2d at 929. Similarly, the administering agency's interpretation of it's own regulation is entitled to substantial deference unless it is plainly erroneous or inconsistent with the regulation. *Mullins Coal Co. v. Director, Office of Workers' Compensation Programs, United States Dep't of Labor*, 484 U.S. 135, 159, 108 S. Ct. 427, 440 (1987), *reh'g denied*, 484 U.S. 1047, 108 S. Ct. 787 (1987).

The caselaw on this issue, although scarce, is unambiguous. The "special rule" exception was designed to provide Commerce some flexibility in the administration of the antidumping laws. Application of the exception, however, is limited to a very particular set of circumstances. These circumstances were satisfied in *Melamine* where the dollar declined, rose sharply, and then declined again, all within a three-month period covered by Commerce's investigation. 732 F.2d at 932.

Plaintiffs' attempt to liken the situation in this case to that in *Melamine* is untenable. The facts in evidence here clearly differ from those in *Melamine*. It is precisely those differences that required application of 19 C.F.R. § 353.56(b) in that instance and preclude its use in this case.

In the aforementioned case, the dumping margin created by the currency exchange rate fluctuation constituted the *entire* dumping margin, *i.e.*, no dumping margin resulted when the fluctuations were accounted for. In the instant action, on the other hand, plaintiffs have not provided the Court with any evidence that the dumping margins resulted *solely* from exchange rate shifts. "The essence of § 353.56(b) is to permit the administering authority (now Commerce) to disregard a margin of dumping when that margin is created *solely* by flexible, temporary fluctuations in the exchange rate of a particular foreign currency against the United States dollar." *Melamine*, 732 F.2d at 928 (emphasis in original). Hence, plaintiffs' assertion that § 353.56(b) is nonetheless applicable, must be rejected.

Yet another factor distinguishes *Melamine* from the case at bar. In sharp contrast to the currency fluctuations experienced in *Melamine*, plaintiffs here admit that the forty percent drop in the value of the dollar occurred during a one-year period. A steady decline in the value of the U.S. dollar over a period of twelve months can hardly be equated with the drastic shifts that occurred during the three-month period involved in *Melamine*.

In *Luciano Pisoni Fabbrica Accessori Instrumenti Musicali v. United States*, 10 CIT 424, 640 F. Supp. 255 (1986), this court again contemplated the proper application of § 353.56(b). There, as in the case at bar, the rate change was not a "temporary fluctuation," but rather a constant decline. *Id.* at 430, 640 F. Supp. at 260. In affirming Commerce's refusal to apply the special provision, the court reasoned on remand that "it was clearly reasonable to distinguish the facts as presented by plaintiffs from those necessary for invoking regulation 353.56(b)." *Luciano Pisoni Fabbrica*, 11 CIT 280, 287, 658 F. Supp. 902, 907 (1987), *aff'd*, 837 F.2d 465 (Fed. Cir. 1988), *cert. denied*, 488 U.S. 819, 109 S. Ct. 60 (1988). This Court also finds Commerce's rationale for distinguishing between temporary fluctuations in exchange rates and constant movement in one direction to be patently sound. Where the currency doesn't fluctuate but instead steadily rises or falls, the importer has more ability to respond to the changes, albeit always being a step behind. The purpose of the "temporary fluctuation" provision is to provide some assurance that the importer had some control over price before accusing the importer of dumping. *Melamine*, 732 F.2d at 933.

Furthermore, because Commerce does acknowledge that a "lag" can occur between the actual market trends and an importer's ability to react to them, the "special rule" provision can be invoked if the record shows the importer's diligent attempt to adjust prices in accordance to the currency shifts. *See Luciano Pisoni Fabbrica*, 11 CIT 280, 658 F. Supp. 902. In the instant action, however, Commerce found that:

> no evidence was submitted showing price adjustments for all customers, nor were the price changes submitted reflective of the 40 percent drop of the value of the dollar against the yen during the period of investigation. Therefore, we have used the official exchange rate as noted in the "Currency Conversion" section of this notice.

52 Fed. Reg. at 30,704.

Plaintiffs, while not denying that they raised their prices only after six months and then, only partially, claim that Commerce should have accepted "NTN's good faith effort to raise prices" as sufficient to invoke application of the "special rule" provision. *Plaintiffs' Memo* at 24. Apparently, NTN discerns that a company that shows an attempt, however feeble, to raise its prices, is automatically exempt from Commerce's scrutiny.[6]The Court finds no merit in this argument.

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[6]Plaintiffs claim that they attempted to, but could not, raise a substantial part of their prices because they were fixed by long-term contracts set before the currency began to fluctuate.

Commerce's regulation states that in order to invoke the "special rule" exception, NTN must have "act[ed] within a reasonable period of time to take into account price differences." 19 C.F.R. § 353.56(b). The record shows that NTN *failed to act for six months* and when it did finally act, did so insufficiently. It is well within the discretion of Commerce in enforcing the antidumping laws to find that six months is an unreasonable period to allow an importer before it raises its prices in response to a currency rate change. *See Melamine*, 732 F.2d at 933 (three months reasonable); *Final Determination of Sales at Less Than Fair Value; Certain Forged Steel Crankshafts From the Federal Republic of Germany*, 52 Fed. Reg. 28,170, 28,176 (July 28, 1987) (seven months unreasonable). Hence, the currency conversion rate applied by the ITA in the FMV comparison was in accordance with law.

3. Most Similar Merchandise in Foreign Market Value Calculation:

Plaintiffs contend that the ITA's methodology for selecting most similar merchandise does not satisfy the requirements prescribed by 19 U.S.C. § 1677 (1982).[7] NTN bases its objections on the following allegations: (a) the maximum individual factor deviations allowed by the ITA were too high; (b) the ITA failed to consider the commercial value of the similar merchandise in its analysis; (c) the ITA did not take into consideration differences presumably created by varying levels of trade; and (d) the ITA's selection of similar merchandise were often not in accordance with the methodology the ITA vowed to implement.

The ITA's methodology, adopted after consultation with all interested parties, considered six (6) individual physical criteria in comparing TRBs: (1) inside diameter; (2) outside diameter; (3) width; (4) type of bearing (*i.e.*, same number of rows of rollers); (5) dynamic load rating; and (6) Y factor. 52 Fed. Reg. at 30,702. The ITA chose its selections by

> taking the U.S. bearing and comparing it to all bearings in the home market in which each individual criterion deviation [was] 10 percent or less. Out of that group of similar bearings, [they] then picked as most similar the home market bearing in which the criterion with the greatest degree of deviation was smaller than the criterion with the greatest degree of deviation in any of the other similar bearings. [They] normally limited individual deviations to 10 percent, al-

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[7] 19 U.S.C. § 1677(16) provides the following three hierarchical definitions for the term "such or similar merchandise." The administering agency is instructed to apply the first category under which a satisfactory determination can be made.

(A) The merchandise which is the subject of an investigation and other merchandise which is identical in physical characteristics with, and was produced in the same country by the same person as that merchandise.

(B) Merchandise –

(i) produced in the same country and by the same person as the merchandise which is the subject of the investigation,

(ii) like that merchandise in component material or materials and in the purposes for which used, and

(iii) approximately equal in commercial value to that merchandise.

(C) Merchandise –

(i) produced in the same country and by the same person and of the same general class or kind as the merchandise which is the subject of the investigation,

(ii) like that merchandise in the purposes for which used, and

(iii) which the administering authority determines may reasonably be compared with that merchandise.

> though where only one factor deviated, [they] allowed bearings where that factor was slightly over 10 percent.

Id. at 30,703.

Although plaintiffs agree that the characteristics selected by the ITA are proper for comparing TRBs, they object to the acceptable deviation formula implemented by the ITA. Rather than allowing an individual factor deviation of up to ten percent, plaintiffs maintain that the most similar merchandise would be obtained if the ITA accepted a sum total ten percent combined deviation. Plaintiffs further charge that the ITA's practice of selecting the bearing with the lowest individual factor deviation effectively disregards the other factors.

An accurate investigation requires that the merchandise used in the comparison be as similar as possible. Furthermore, as plaintiffs correctly maintain, there is a statutory preference for comparison of most similar, if not identical merchandise for the purpose of FMV calculations. *Timken Co. v. United States*, 10 CIT 86, 96, 630 F. Supp. 1327, 1336 (1986) (*"Timken I"*); *Smith-Corona Group, Consumer Prod. Div., SCM Corp. v. United States*, 713 F.2d 1568, 1578 (Fed. Cir 1983), *cert. denied*, 465 U.S. 1022 (1984). Undoubtedly, the ITA's fundamental objective in an antidumping investigation is to compare the United States price of imported merchandise with the value of "such or similar merchandise" sold in the foreign market. *Timken I*, 10 CIT at 95, 630 F. Supp. at 1336.

Commerce has traditionally been granted broad discretion in the selection of methodology implemented to achieve its mandate. Hence, absent a showing of unreasonableness on the part of the agency, its choice of methodology shall be sustained. *Ceramica Regiomontana, S.A. v. United States*, 10 CIT 399, 404-05, 636 F. Supp. 961, 966 (1986), *aff'd*, 810 F.2d 1137 (Fed. Cir. 1987). Moreover, it is the administering agency rather than an interested party that should make the determination as to what methodology should be used. *Timken I*, 10 CIT at 98, 630 F. Supp. at 1338.

In the case at bar, plaintiffs have not provided any evidence of unreasonable behavior on the part of Commerce. The Commerce Department was not required to adopt the methodology advanced by plaintiffs. Furthermore the record supports Commerce's contention that its methodology was reasonable. The court will uphold Commerce's judgment absent a clear showing that it was not supported by substantial evidence. *Ceramica Regiomontana*, 10 CIT at 404, 636 F. Supp. at 965.

Next, plaintiffs maintain that Commerce further disregarded its statutory mandate by "not considering commercial value of the home market bearing" in selecting most similar merchandise. *Plaintiffs' Memo* at 28. In support of this contention, plaintiffs allude to this court's opinion on remand in *Timken Co. v. United States*, 11 CIT 786, 673 F. Supp. 495 (1987) (*"Timken II"*). Plaintiffs' reliance on that case is, however, misplaced. In *Timken II*, the issue of commercial value was remanded to Commerce because "the court [could not] determine from the record

whether the agency did in fact consider commercial value." 11 CIT at 792, 673 F. Supp. at 503.

By way of contrast, Commerce in this case directly addressed the issue of commercial value and determined:

> it is not possible to measure approximate eguality in terms of commercial value. One must specify a particular commercial application, using the system life formula, in order to measure the commercial value of specific bearings. Therefore, we determined under section 771(16)(C) which home market products reasonably could be compared to the TRBs sold to the United States.

52 Fed. Reg. at 30,702-703. Section 771(16)(C), codified as 19 U.S.C. § 1677(16)(C), provides alternate criteria the ITA must use to determine "such or similar merchandise." See supra n.7. It defines similar merchandise as that fitting into the first of three categories "in respect of which a determination for the purposes of part II of this subtitle can be satisfactorily made." 19 U.S.C. § 1677(16).

Commerce here was unable to determine "such or similar merchandise" pursuant to 19 U.S.C. § 1677(16)(A) or (B), and was therefore statutorily required to resort to § 1677(16)(C) to determine "such or similar merchandise." The record shows this to be precisely what Commerce did. Hence, plaintiffs' argument cannot be earnestly espoused.

With respect to plaintiffs' contention that the ITA's disregard of levels of trade differences is contrary to law, plaintiffs have not provided, nor has the court uncovered any support for this argument. To the contrary, this court has noted previously that there is no statutory mandate requiring Commerce to remain within the same levels of trade while effecting its "such or similar merchandise" determination. *Timken II*, 11 CIT at 793, 673 F. Supp. at 504. Plaintiffs, therefore, have no basis for requesting that the Court require Commerce to limit its comparisons by the level of trade in which the sales occur.

In sum, upon examination of the record evidence, the Court finds ample support for the ITA's choice of methodology. This is not an instance where the ITA has mutely and arbitrarily adopted a methodology. Instead, the record indicates that the ITA duly considered suggestions from the interested parties before adopting a methodology and provided clear, reasonable explanations for the methodology to be implemented. Accordingly, the ITA's choice of methodology and "such or similar merchandise" determination are affirmed.

Nevertheless, plaintiffs have provided some indication that Commerce may have substantially departed from its stated methodology. These allegations have not been addressed by Commerce either on the record or before this Court. The Court cannot review Commerce's actions without proper explanation on the record. Toho, 11 CIT at 167, 657 F. Supp. at 1286. Hence, this issue must be remanded to Commerce for an inquiry into whether the ITA did in fact substantially depart from its stated methodology. If Commerce finds plaintiffs' allegations to be sufficiently substantiated by the record evidence, and if such a departure signifi-

cantly affected it's FMV calculation, the ITA shall effect the necessary corrections.

4. ANBM's Depreciation Expenses:

In calculating exporter's sales price for plaintiffs' imported TRB components, Commerce deducted manufacturing expenses including, *inter alia*, the cost of depreciation of manufacturing equipment purchased by American NTN Bearing Manufacturing Corporation ("ANBM") from NTN. Depreciation cost of the machinery (as reported for bookkeeping purposes) is generally composed of actual cost of the equipment plus the amount of profit to the parent company. Plaintiffs assert that Commerce should have subtracted the amount of intra-company profit that was included in the cost of the machines to ANBM when calculating depreciation expense. Commerce defends its failure to eliminate intra-company profits from the amount to be depreciated by stating that plaintiffs untimely filed their claim in the pre-hearing briefs.

Commerce scheduled on-site verification of plaintiffs' questionnaire responses on May 19-21, 1987 (Illinois), and on June 1-12, 1987 (Japan). *Plaintiffs' Reply to Defendant's Opposition to Plaintiffs' Motion for Judgment on the Agency Record as to Counts II Through VI of the Complaint as Supplemented* at 14 *("Plaintiffs' Reply")*. During verification, Commerce claims it merely verified the costs *reported* by plaintiffs, not the actual costs for each aspect of the manufacturing process. This information was all that Commerce said it would verify. *Defendant's Surreply* at 3. Prehearing briefs were filed in July of 1987, wherein plaintiffs specifically requested Commerce to adjust the amount to be depreciated. *Id.*

That the ITA must have information concerning actual costs, as opposed to mere standard costs, in order to determine whether intra-company profits were included in the price, is established by past ITA practice. In *Cellular Mobile Telephones and Subassemblies From Japan; Final Determination of Sales at Less Than Fair Value*, the ITA noted that "[w]hen the Department uses the actual costs of production for the components, profit is not double counted. However, when transfer or market values are used [to determine profit margin], there is no basis to determine profit, if any, included in these amounts." 50 Fed. Reg. 45,447, 45,453 (Oct. 31, 1985). *Cf. Final Determinations of Sales at Less Than Fair Value: Antifriction Bearings (Other Than Tapered Roller Bearinas) and Parts Thereof From the Federal Republic of Germany*, 54 Fed. Reg. 18,992, 19,078 (May 3, 1989). It is therefore entirely reasonable for Commerce to require actual cost figures in order to calculate intra-company profits.

Moreover, the ITA must verify all information which constitutes a basis for its final determination. 19 C.F.R. § 353.51 (1987). For that reason, if the ITA had not verified the actual cost of each aspect of NTN's costs of production, it would be precluded from adjusting ANBM's depreciation expense to reflect intra-company profits. The Court finds no indication in the questionnaire responses or elsewhere, that plaintiffs voiced a re-

quest before or during verification about the inclusion of intra-company profits in the amount to be depreciated.

The on-site verification report filed by Commerce indicates that it considered "cost of production information" for the parts sold to ANBM, which consisted of "the standard cost of the TRB part, adjusted by the variance." *Confidential Record Document 54* at 33. Commerce then compared the sales prices to NTN's reported cost of production. *Id.* Verification then, consisted merely of documentation supporting the fact that the TRB components were sold at a price higher than the standard costs for the part. Commerce's verification procedures never broached the issue of what portion of NTN's depreciation expenses was actual cost versus intra-company profits.

As the record indicates that the ITA did not verify the facts necessary to make a determination as to the inclusion of intra-company profits in the amount to be depreciated, Commerce was precluded from allowing an adjustment for plaintiffs' depreciation expenses.

5. *United States Direct Selling Expenses as Adjustment to ESP:*

Plaintiffs challenge the ITA's treatment of direct selling expenses as adjustments to ESP. Plaintiffs maintain that direct selling expenses are to be considered as a circumstance of sale adjustment under 19 U.S.C. § 1677b, and as such, constitute an adjustment to FMV. *Plaintiffs' Memo* at 40. Defendant instead asserts that pursuant to 19 U.S.C. § 1677a(e)(2), Commerce properly deducted indirect selling expenses, as well as certain *direct* selling expenses from ESP.

The object of an antidumpimg investigation is to achieve a fair comparison of the United States price and fair market value of the merchandise at issue. To accomplish this aim, both calculations are subject to adjustment. *Smith-Corona Group*, 713 F.2d at 1571-72. Where Commerce uses ESP to calculate United States price, the allowable adjustments to that figure are prescribed in 19 U.S.C. § 1677a(d) and (e).[8]

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[8] Section 1677a of title 19 provides in pertinent part:

(d) Adjustments to purchase price and exporter's sales price

The purchase price and the exporter's sales price shall be adjusted by being--

(1) increased by--

(A) when not included in such price, the cost of all containers and coverings and all other costs, charges, and expenses incident to placing the merchandise in condition, packed ready for shipment to the United States;

(B) the amount of any import duties imposed by the country of exportation which have been rebated, or which have not been collected, by reason of the exportation of the merchandise to the United States;

(C) the amount of any taxes imposed in the country of exportation directly upon the exported merchandise or components thereof, which have been rebated, or which have not been collected, by reason of the exportation of the merchandise to the United States, but only to the extent that such taxes are added to or included in the price of such or similar merchandise when sold in the country of exportation; and

(D) the amount of any countervailing duty imposed on the merchandise under part I of this subtitle or section 1303 of this title to offset an export subsidy, and

(2) reduced by--

(A) except as provided in paragraph (1)(D), the amount, if any, included in such price, attributable to any additional costs, charges, and expenses, and United States import duties, incident to bringing the merchandise from the place of shipment in the country of exportation to the place of delivery in the United States; and

(B) the amount, if included in such price, of any export tax, duty, or other charge imposed by the country of exportation on the exportation of the merchandise to the United States other than an export tax, duty, or other charge described in section 1677(6)(C) of this title.

Section 1677b of title 19 permits "other adjustments" to FMV for, *inter alia*, "other differences in circumstances of sales."

This court, as well as our appellate court, has had numerous occasions to analyze the proper application of direct selling expenses and have consistently concluded that direct selling expenses and have consistently concluded that direct selling expenses are properly characterized as differences in circumstances of sale giving rise to an adjustment of FMV. *E.g., Consumer Prod. Div., SCM Corp. v. Silver Reed America, Inc.*, 753 F.2d 1033 (Fed Cir. 1985); *Smith-Corona Group*, 713 F.2d 1568; *Timken II*, 11 CIT 786, 673 F. Supp. 495. Upon further analysis, this Court yields the same result.

Commerce's argument for deducting direct selling expenses from exporter's sales price pursuant to 19 U.S.C. § 1677a(e)(2) cannot be embraced. "Section 1677a(e)(2) has been understood to refer to *indirect*, not direct expenses." *Timken II*, 11 CIT at 802, 673 F. Supp. at 511 (emphasis in original). Moreover, under the framework espoused by Commerce, the ITA would be devoid of any statutory basis for adjusting for direct selling expenses in cases requiring the use of "purchase price" as United States price. It is highly improbable that Congress intended this inconsistent result. When the agency's interpretation of a statute is incongruous with that of Congress, the court may not sanction the agency's action. *Federal Labor Relations Auth. v. Aberdeen Proving Ground, Dep't of the Army*, 108 S. Ct. 1261, 1263 (1988).

Hence, the Court finds that Commerce erred in deducting direct selling expenses from exporter's sales price. This issue is therefore remanded to Commerce, which shall recalculate plaintiffs' dumping margin to reflect an adjustment of foreign market value for direct selling expenses.

6. Validity of the 10%-90% Test:

During its investigation, the ITA excluded sales below cost of production from its FMV determination, pursuant to 19 U.S.C. § 1677(b) (1982). Commerce determined that since sales below cost of production constituted over ten percent of plaintiffs' home market sales, these should be disregarded in calculating FMV. Commerce concluded its analysis at that point, never addressing the issues of whether: (1) the sales were made over an "extended period of time," or (2) the sales were at prices allowing recovery of all costs.

NTN alleges that the use by the ITA of the 10%-90% test to determine whether less than cost of production sales by plaintiffs should have been excluded from its FMV calculation, was contrary to law. Commerce ar-

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[8](. . . continued)

(e) Additional adjustments to exporter's sales price.

For purposes of this section, the exporter's sales price shall also be adjusted by being reduced by the amount, if any, of –

(1) commissions for selling in the United States the particular merchandise under consideration,

(2) expenses generally incurred by or for the account of the exporter in the United States in selling identical or substantially identical merchandise, and

(3) any increased value, including additional material and labor, resulting from a process of manufacture or assembly performed on the imported merchandise after the importation of the merchandise and before its sale to a person who is not the exporter of the merchandise.

gues that the 10%-90% test is a "reasonable guideline or interpretive rule, a statement of current policy, for determining whether sales have been made in substantial quantities," 52 Fed. Reg. at 30,708, and that given the determination that below cost sales were made in substantial quantities, it was permitted to disregard those sales without further inquiry.

Pursuant to 19 U.S.C. § 1677(b), the ITA shall disregard sales below cost of production where the administering authority determines that sales made at less than cost of production—

> (1) have been made over an extended period of time and, and in substantial quantities, and
>
> (2) are not at prices which permit recovery of all costs within a reasonable period of time in the normal course of trade.

Since the statute does not provide a specific standard for what constitutes "substantial quantities," the ITA has often used a percentage of sales below cost of production as a reference point in determining whether or not to include such sales in it's FMV calculations. *See e.g. Final Determination of Sales at Less Than Fair Value; Fall-Harvested Round White Potatoes From Canada*, 48 Fed. Reg. 51,669, 51,672 (Nov. 10, 1983); *Certain Steel Wire Nails From the Republic of Korea; Antidumping: Final Determination of Sales at Less Than Fair Value and Exclusions From Final Determination*, 47 Fed Reg. 27,392, 27,393 (June 24, 1982).

In *Timken II*, the court noted the vagueness of the term "substantial" and declared that the ten-percent test

> is consistent with [congressional] intent, given the vagueness of the term "substantial"; the likelihood that usually there will not be industry characteristics sufficient to support fine distinctions between cases on the basis of "substantiality"; and the agency's use of the ten-percent test as a benchmark only, to be applied absent indication on the facts before it that use of the percentage will not implement legislative intent.

11 CIT at 807, 673 F. Supp. at 515. The 10%-90% test, as applied to substantiality, is deemed an interpretive rule which gives a reasonable and practical interpretation to the term "substantial". *Id.* As an interpretive rule of a vague statute, the 10%-90% test is not arbitrary to the extent that it is reasonably applied. Accordingly, the Court holds that absent proof in the evidence before it that using the test would violate congressional intent, the ITA was correct in applying it.

This court has distinguished, however, between the use of such percentages for measuring substantiality, and their use for measuring periods of time and ability for cost recovery. *Timken II*, 11 CIT 786, 673 F. Supp. 495. With regard to the issue of time periods and ability to recover costs, there is scant evidence to persuade the Court that a certain percentage of sales at less than cost of production should constitute sufficient proof that such sales "have been made *over an extended period of*

time" or that their cost of production could not be recovered over a reasonable time. *See Timken II*, 11 CIT at 807, 673 F. Supp. at 515 (emphasis in original).

"[I]t does not follow from the fact that more than ten percent of a product has been sold below cost, that those sales occurred over an 'extended period of time.'" *Id.* at 807, 673 F. Supp. at 515. The statute requires Commerce to independently determine whether sales at less than cost of production were made over an "extended period of time" and whether the sales at less than cost of production were at prices permitting recovery of costs over a reasonable period of time. Hence, Commerce cannot summarily disregard these mandates simply because it determined that at least ten percent of home market sales were at less than cost. Toho, 11 CIT 160, 657 F. Supp. 1280.

Therefore, the Court directs Commerce to determine whether plaintiffs' home market sales at prices below cost of production were made over an extended period of time. Commerce will also determine whether these sales were at prices which would permit recovery of all costs of production within a reasonable time. In each instance Commerce will substantiate it's determination on the record so the Court can evaluate the propriety of its actions.

7. "Splitting" of TRB Set Price:

As previously stated, a TRB consists of a cup and a cone. Where cup and cone components were sold individually in the United States but only in sets in the home market, the ITA calculated separate home market cup and cone component price equivalents.

> [W]here cup and cone components were sold in the United States and only sets composed of those identical or most similar were sold in the home market, we compared the U.S. sales of cups and cones to the home market sales of sets by determining the ratio of the direct manufacturing cost of the cup and cone to that of the complete set. This ratio was applied to the home market price of the set to calculate the price equivalent in the home market * * *. As long as the component cup or cone is "most similar" to the merchandise exported to the United States, we conclude that it is appropriate to use it in the comparison.

52 Fed. Reg. at 30,703. Plaintiffs maintain that this method of "splitting" sets to compute price equivalents is contrary to the statutory guidelines set forth in 19 U.S.C. § 1677b for the calculation of FMV. Instead, plaintiffs assert, a constructed value should have been used as FMV. *Plaintiffs' Memo* at 46.

Analysis of 19 U.S.C. § 1677b produces no support for plaintiffs' argument. Section 1677b(a)(2) sanctions the use of conctructed value *only* when the ITA determines that the foreign market value of the imported merchandise cannot be determined by sales of "such or similar" merchandise in the home market. That was not the case here, however, since the ITA concluded that it could accurately ascertain the foreign market value of "such or similar merchandise" by determining the ratio of the

direct manufacturing cost of the cup and cone and comparing it to that of the complete set.

"Nor can section 1677b(a)(1)(B) reasonably be interpreted as preventing the ITA from determining prices of home market merchandise whenever that merchandise was sold together with other merchandise for a single price." *Timken II*, 11 CIT at 794, 673 F. Supp. at 505. Section 1677b(a)(1)(B) simply states that, for the purpose of determining FMV, pretended sales are to be disregarded. Again, the circumstances herein do not establish pretended sales. There is no doubt that sales of "such or similar merchandise" occurred in the home market.

Furthermore, such interpretation would encourage importers to circumvent the antidumping laws by simply using divergent invoicing methods. It is inconceivable to this Court that Congress would have intended to enact a legislative provision that would clearly facilitate, if not promote, the circumvention of the dumping laws. Accordingly, the Court finds that the ITA was authorized to "split" unitary set prices if it determined that this method would render an accurate FMV calculation for the individual cups and cones.

8. Warehouse Expenses:

In the course of Commerce's investigation, NTN claimed a circumstance of sale adjustment commensurate with certain warehousing expenses incurred in order to facilitate prompt delivery to home market customers on a "just in time" basis. *Plaintiffs' Memo* at 50. Plaintiffs maintain that the warehousing expenses were "directly related to the particular sales under consideration by the ITA," and therefore should have been allowed as a circumstance of sale adjustment to FMV. *Id.*

Commerce rejected plaintiffs' claim, reasoning that the ITA had determined the date of sale to be the date of actual delivery to home market clients (as that was the date on which all terms of the sale were finalized) and the warehousing costs were incurred prior to that date. Hence, Commerce "treated those expenses as indirect selling expenses" and they "were used only in calculating the ESP offset," consistent with their long-standing practice. 52 Fed. Reg. at 30,704.

Appropriate allowance shall be given when it is established to the satisfaction of the administering authority that any amount of difference between United States price and foreign market value is due, in whole or in part, to differences in circumstances of sale. 19 U.S.C. § 1677b(a)(4)(B). Differences in circumstances of sale for which allowances will be made are generally limited to those circumstances which bear direct relation to the sales under consideration. 19 C.F.R. § 353.15 (1987); *F.W. Myers & Co. v. United States*, 72 Cust Ct. 219, C.D. 4544, 376 F. Supp. 860 (1974).

It is by now established that freight and warehousing charges incurred in the home market may merit a circumstance of sale adjustment. *Brother Indus, Ltd. v. United States*, 3 CIT 125, 144-46, 540 F. Supp. 1341, 1359-61 (1982); *Silver Reed America, Inc. v. United States*, 7 CIT 23, 34, 581 F. Supp. 1290, 1298 (1984). Therefore, in order to effect an

adjustment to FMV, the ITA must conclude that the warehousing costs were indeed directly related to the sales under consideration.

A circumstance of sale adjustment for pre-sale warehousing costs was allowed in *Asahi Chem. Indus. Co. v. United States*, 12 CIT ___, 692 F. Supp. 1376 (1988), *dismissed on reh'g*, 13 CIT ___, 727 F. Supp. 625 (1989). The *Asahi* court reasoned: "The sales under consideration were all sales in the home market during the investigative period. If the expenses considered by Treasury can be found to bear a direct relationship to these sales, they should have been allowed." 12 CIT at ___, 692 F. Supp. at 1379.

It appears from the evidence that Commerce summarily rejected plaintiffs' claim (because the warehousing costs were incurred prior to the date of the sale) without ascertaining whether there was any direct correlation between the pre-sale warehousing costs and the sales under consideration. Plaintiffs' submissions indicate, however, that the warehousing costs were incurred solely by reason of the delivery requirements of two particular clients and that sales to these clients occurred during the time period covered by Commerce's investigation. It appears then, that the circumstances required the ITA to conduct the analysis set forth in 19 C.F.R. § 353.15, and while this Court will not attempt to substitute its judgment for that of the ITA, it nevertheless cannot sanction the agency's disregard of its own regulation.

Consequently, the Court concurs with *Asahi* that if plaintiffs can establish that the pre-sale warehousing expenses were indeed directly related to the sales under investigation, then a proper adjustment should be allowed. This issue is remanded to the ITA for determination of whether the warehousing costs were in fact directly related to the sales under consideration. If so, the ITA is directed to treat them as an appropriate circumstance of sale adjustment to FMV.

9. *Usual Commercial Quantities:*

Pursuant to 19 C.F.R. § 353.20 (1987),[9] Commerce based plaintiffs' foreign market value on a weighted average of prices for sales in the home market. 52 Fed. Reg. at 30,703. NTN argues that this constitutes a substantial and unacceptable departure from the statutory directive. *Plaintiffs' Memo* at 53.

Foreign market value shall be based on the price "at which such or similar merchandise is sold or, in the absence of sales, offered for sale in the principal markets of the country from which exported, *in the usual commercial quantities* and in the ordinary course of trade for home consumption." 19 U.S.C. § 1677b(a)(1)(A) (1982 & Supp. V 1987) (emphasis added). "Usual commercial quantities" is further explained in 19 U.S.C. § 1677(17) (1982 & Supp. V 1987). This section provides that in instances

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[9] 19 C.F.R. § 353.20 provides in pertinent part:

(a) Where the prices of the sales which are being examined for a determination of foreign market value vary * * *, the determination of foreign market value normally will be based upon the weighted average of the sales prices of all merchandise used to determine foreign market value;

where the merchandise in issue is sold in the market under consideration "at *different prices for different quantities*," the term is defined as "the quantities in which such merchandise is there sold at the price or prices * * * for any other quantity." *Id.* (emphasis added).

Plaintiffs herein did not provide Commerce with, nor does it purport to possess any "evidence that it charged its home market customers different prices for different set quantities." 52 Fed. Reg. at 30,703. Instead, NTN simply argues that § 1677b "clearly contemplates that there may be more than one price for a single guantity of merchandise" and where there is "more than one price for a single quantity of merchandise, there can never be a positive correlation between price and quantity." *Plaintiffs' Memo* at 54. Plaintiffs' implausible analysis require a broad, if not extraordinary interpretation of the statute, which this Court is not prepared to adopt. It is manifest that the application of the definition provided in 19 U.S.C. § 1677(17) is conditioned upon establishing a correlation between sales at different prices for different quantities—a condition which plaintiff herein failed to meet.

Since the statute does not provide further guidance on how fair market value should be determined when the merchandise is not sold in "usual commercial quantities," it is well within Commerce's discretion to implement regulations designed to facilitate the execution of the statutory mandate, *i.e.*, to secure an accurate FMV calculation, provided the regulations are reasonable and not contrary to statutory intent. As such, the ITA practice of basing foreign market value on a weighted average of all prices charged in the home market is affirmed.

10. Cost of Production:

As previously discussed, section 773 of the Tariff Act of 1979, codified in 19 U.S.C. § 1677b, requires the ITA to calculate a foreign market value for the merchandise under investigation and that, for this purpose, home market sales made at "less than cost of production" be disregarded. Commerce interprets "cost of production" to include general administrative and selling expenses. Plaintiffs disagree and claim that the term applies only to "costs for materials, fabrication and factory overhead". *Plaintiffs' Memo* at 55.

Unlike many other terms employed in the statute, nowhere in the statutory framework does there appear a definition for "cost of production." Given that most other terms are defined in detail, it is highly unlikely that this ambiguity resulted by reason of congressional oversight. When, as in this instance, Congress clearly chooses to remain silent on a specific issue, the court will grant substantial deference to the ITA's interpretation of a statutory provision, as long as it is reasonable. *K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 286, 108 S. Ct. 1811, 1817 (1988).

As this court has previously determined, the ITA's interpretation is clearly in keeping with the expressed legislative concern that unless home market below cost sales are disregarded, "sales uniformly made at less than cost of production could escape the purview of the Act, and thereby cause injury to the United States industry with impunity." S.

Rep. No. 1298, 93rd Cong., 2d. Sess. 173, *reprinted in* 1974 U.S. Code Cong. & Admin. News 7310; *Timken*, 11 CIT at 811, 673 F. Supp at 518. Hence, the ITA's definition of "cost of production" is affirmed as reasonable and in conformity with the statutory mandate.

11. Level of Trade Adjustment:

As previously noted, throughout the administrative proceedings plaintiffs maintained that their home market sales were effectuated at three distinct levels of trade and therefore the ITA should restrict its FMV comparisons within each level. Although the agency endeavored to compare identical merchandise sold at the same commercial level of trade in both the United States market and the home market, in instances where such parity could not be achieved, the ITA "made [its] comparisons at the other level of trade and adjusted for differences in level of trade, in accordance with § 353.19 of [its] regulations." 52 Fed. Reg. at 30,701.

Plaintiffs now argue that if the ITA is not precluded from crossing over levels of trade in its FMV comparison, then it is required by regulation to make "appropriate adjustment" for level of trade differences. Notwithstanding the adjustment already effected by the ITA which plaintiffs terms "minor," NTN maintains that the agency should have also considered, inter alia, differences in profitability when computing the level of trade adjustment.

When FMV comparisons cannot be made at the Fame commercial level of trade, Commerce's regulations authorize the administrative agency to make adjustments for differences in levels of trade that affect price comparability. 19 C.F.R. § 353.19 (1987). A level of trade adjustment is generally given to allow for differences in expenses incurred in selling to the different commercial levels. Eligibility of an importer to this adjustment is, like all others, conditioned upon proving entitlement to the satisfaction of the administering agency. 19 U.S.C. § 1677b(a)(4).

In the case at bar, Commerce clearly rejected plaintiffs' allegations that their merchandise was sold at three distinct channels of trade. Referring to NTN's claim that automobile manufacturers and original equipment manufacturers constituted different levels of trade, Commerce stated: "We rejected this argument since automobiles are a type of original equipment and respondent did not demonstrate significant differences in the expenses incurred in selling to these two classes of customers." 52 Fed. Reg. at 30,701. Plaintiffs failed to establish any differences in selling expenses between sales to automobile manufacturers and original equipment manufacturers. Hence, no adjustment was warranted. The ITA is not required nor is it in the practice of considering factors such as profitability when determining whether to allow a level of trade adjustment. *See Study of Antidumping Adjustments Methodology* 53 (1985). Therefore, the agency's decision to deny a further level of trade adjustment was reasonable and in accordance with law.

12. Warehouse Expenses: ESP Offset Pool:

Finally, plaintiffs maintain that in its final determination, the ITA unlawfully omitted home market warehouse expenses in the ESP offset pool calculation. Commerce concurs, and joins in NTN's motion that this matter be remanded to the ITA for recalculation.

It is long standing agency practice to pool indirect home market selling expenses, such as warehouse expenses, and offset them against indirect selling expenses incurred in the United States. See 19 C.F.R. § 353.15(c) (1987); *Timken II*, 11 CIT at 796 n.18, 673 F. Supp. at 506; *Smith Corona Group*, 713 F.2d. at 1578. Warehouse costs are precisely the type of indirect selling expenses generally incorporated into the ESP offset pool. Consequently, if plaintiffs' claimed home market warehouse expenses were properly substantiated, they should have been included in the ESP offset pool calculation.

NTN provided the ITA with the data necessary for it to include said expenses in its ESP offset pool and the agency indicated, in the final determination, its intention to incorporate the warehousing expenses in the ESP offset pool calculation. 52 Fed. Reg. at 30,704. An inadvertent programming error, however, caused the warehouse expenses to be omitted from the ESP offset pool calculation.

The Court therefore remands this matter to the Commerce Department with instructions that it incorporate plaintiffs' home market warehouse expenses into the ESP offset pool computation in accordance with established agency practice.

Conclusion

In summary, the Court hereby remands to the Commerce Department the following issues for recalculation in accordance with this opinion.

(1) Commerce shall determine if the ITA substantially failed to implement its stated methodology for selection of "such or similar merchandise." If such departure occurred and significantly affected its FMV calculation, the ITA shall effect the necessary corrections.

(2) Commerce shall recalculate plaintiffs' dumping margin to reflect an adjustment to FMV, rather than exporter's sales price, for direct selling expenses.

(3) In determining whether to disregard plaintiffs' home market sales at prices below cost of production, Commerce shall take into consideration whether these were made over an extended period of time and at prices which would permit recovery of all costs of production within a reasonable time.

(4) Commerce shall determine whether the warehousing costs claimed by plaintiffs were in fact directly related to the sales under consideration. If so, the ITA is directed to treat them as an appropriate circumstance of sale adjustment to FMV.

(5) Commerce shall include home market warehouse expenses in the computation of the ESP offset pool.

The remainder of Commerce's final antidumping determination is hereby affirmed in all respects. Commerce shall report the results of its remand determination to the court within forty-five days.

(Slip Op. 90-89)

FADA INDUSTRIES, INC., PLAINTIFF *v.* UNITED STATES, DEFENDANT

Court No. 84-11-01610 etc.

MEMORANDUM AND ORDER

[Plaintiff's motion for reinstatement of actions on suspension disposition calendar denied.]

(Decided September 7, 1990)

Soller, Singer & Horn (*Clarence J. Erickson*) for the plaintiff.
Stuart M. Gerson, Assistant Attorney General; *Joseph I. Liebman*, Attorney in Charge, International Trade Field Office, Commercial Litigation Branch, U.S. Department of Justice (*James A. Curey*) for the defendant.

AQUILINO, *Judge*: The plaintiff has presented the court with a motion to rescind orders of dismissal of the above action and some 12 others and to reinstate them on a suspension disposition calendar under *Belfont Sales Corp. v. United States*, 11 CIT 541, 666 F. Supp. 1568 (1987), *reh'g denied*, 12 CIT ___, 698 F. Supp. 916 (1988), *aff'd*, 878 F.2d 1413 (Fed.Cir. 1989), a test case which is now final. The defendant does not object to grant of the motion, but its stance is not automatically dispositive.

The motion states that the covered actions were "dismissed in error on August 9, 1990, pursuant to Rule 85(d)." That rule provides, in pertinent part:

> *Dismissal for Lack of Prosecution.* An action not removed from the Suspension Disposition Calendar within the established period shall be dismissed for lack of prosecution, and the clerk shall enter an order of dismissal without further direction of the court * * *.

The Clerk correctly carried out the mandate of this rule based upon the following circumstances: The suspension disposition calendar was established in September 1989, and some 600 actions, including those at bar, were placed on it for a period of 90 days. Thereafter, motions to extend the time were made and granted, as appropriate. The plaintiff filed a third such motion, which was decided by the court in an unpublished decision dated June 25, 1990 and stating:

> * * * The motion indicates that proposed stipulation(s) on agreed statement(s) of fact(s) have been submitted to the defendant, but it does not state when or explain what, if any, steps have been taken since then or why the past months have not been enough to dispose of the covered actions.
>
> If the cause of the delay is the defendant, it makes no effort to explain; it simply consents to the motion.
>
> The court cannot grant the relief requested in such a vacuum. No attempt is made to address the concerns indicated in *E. Gluck Corp. v. United States*, 13 CIT ___, Slip Op. 89-154 (Oct. 27, 1989), and 14 CIT ___, Slip Op. 90-39 (April 19, 1990), and at a subsequent hear-

> ing in open court therein on April 30, 1990. There is no showing that the parties are fulfilling their obligations with the degree of diligence required under the circumstances. Thus, the court concludes that the actions covered by plaintiff's motion may only remain on the suspension disposition calendar until July 31, 1990. If by that time the actions have not been disposed of, judgments may be entered therein against the party in default.

When the actions had not been disposed by July 31st, the Clerk dismissed them in accordance with this decision and the above rule.

In addition to references to the filing of the proposed stipulation(s) and judgment(s) and to the foregoing decision, plaintiff's counsel state the following in their motion:

> In our August 1, 1990 letter to Judge Aquilino on behalf of Plaintiff, * * * we detailed the history of this case, including plaintiff's diligent prosecution of this action since its inception. Most recently, we have supplied all documents requested by defendant and have moved for extensions of time solely to preserve plaintiff's rights in this matter.
>
> In our August 1st letter, we requested that the June 25, 1990[ ] order be complied with and judgment be entered in favor of the plaintiff. We alternatively requested that the actions not be removed from the Suspension Disposition Calendar, pending final settlement.
>
> * * * * * * *
>
> On several occasions the defendant has requested duplicates of old entry papers which were apparently missing from the court files. Plaintiff has continuously preserved its rights in these cases by complying promptly with each and every government request and, more significantly, by initiating most of the exchanges which have occurred between the parties in an effort to obtain final judgments in these cases.
>
> Plaintiff has attempted to explain to the court that it can not force the government to enter judgments in these cases, which should have been entered by July 31, 1990. Plaintiff has performed all obligations on its part, yet is currently faced with the dismissal of these cases as a result of "failing to prosecute" these matters.

In other words, the plaintiff believes that the defendant, rather than itself, is the real party in default.

However, while the defendant may not have lived up to an October 5, 1989 commitment herein to do its "best to comply with the deadline imposed by the Court"[1], its procedural shortcomings do not necessarily protect its adversary. Indeed, each side has specific responsibilities, as well as rights. In *E. Gluck Corp. v. United States*, 13 CIT ____, ____, Slip Op. 89-154, at 2-3 (Oct. 27, 1989), this court sought to remind counsel for the plaintiffs in all of the suspended actions, including those at bar, of rights such as set forth in CIT Rule 85(c) and, at the same time, to warn them of

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[1] Plaintiff's Motion to Rescind Order of Dismissal and For Reinstatement of Actions on the Suspension Disposition Calendar, Exhibit 2, p. 2.

the possible consequences of failing to proceed with proper care, citing as an example *Men's Wear International, Inc. v. United States*, 13 CIT ___, Slip Op. 89-142 (Oct. 13, 1989).

In this action, the court does not doubt that the plaintiff has been well-intentioned, in keeping with the goal of CIT Rule 1 of a just, speedy, and inexpensive determination, but it failed to preserve an opportunity for entry of judgment in its favor after July 31, 1990. Certainly, communications with opposing counsel (and the court) are informative, but they are not and were not protective of continuing viability of that opportunity. When formal, interlocutory relief becomes necessary, motions therefor must be presented in such a way as to convince the court that grant is appropriate. *Cf., e.g., Proceedings of the Second Annual Judicial Conference of the U.S. Court of Int'l Trade*, 111 F.R.D. 504, 586 (1985) (Aquilino, J.). Plaintiff's June 1990 motion was only partially successful in this regard, and its present motion for reinstatement, as quoted essentially *in toto* above, fails completely.

The plaintiff seeks, of course, judgment but has not set forth grounds upon which that relief could now be granted. Moreover, at this stage, the existence of grounds for reinstatement is not otherwise apparent, given the commencement of its uncomplicated actions in 1984 *et. seq.*, the first decision[2] of the test case in 1987, the placement of these actions on the suspension disposition calendar in 1989 after affirmance of the test case by the court of appeals, and the three grants of extensions of time (totalling more than 200 days in addition to the original 90) on that calendar for the actions at issue. *Cf. Melcher & Landau, Inc. v. United States*, 14 CIT ___, Slip Op. 90-82 (Aug. 28, 1990) (motion to amend stipulated judgment denied because it would have effect of extending deadline for remaining on suspension calendar). Hence, plaintiff's motion to rescind orders of dismissal of the above action and 12 others and to reinstate them on the suspension disposition calendar must be, and it hereby is, denied.

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[2]The court's opinion relied in significant part on precedents dating back to 1979.

(Slip Op. 90–90)

TORRINGTON CO., PLAINTIFF *v.* UNITED STATES, DEFENDANT, NIPPON SEIKO K.K. AND NSK CORP.; ICSA INDUSTRIES CUSCINETTI S.P.A.; NTN CORP., NTN BEARING CORP. OF AMERICA, AMERICAN NTN BEARING MANUFACTURING CORP. AND NTN TOYO BEARING CO., LTD.; INA BEARING CO., INC., INA WALZLAGER SCHAEFFLER KG, INA ROULEMENTS, S.A., AND INA BEARING CO., LTD.; KOYO SEIKO CO., LTD. AND KOYO CORP. OF U.S.A.; HOESCH ROTHE ERDE SCHMIEDAG AG AND ROTEK INC.; NIPPON THOMPSON CO., LTD.; SKF USA, INC., AB SKF, SKF GMBH AND SKF GLEITLAGER GMBH, SKF FRANCE, RIV-SKF INDUSTRIES, S.P.A., SKF SVERIGE AB, AND SKF (U.K.) LIMITED; CATERPILLAR INC.; AND FAG KUGELFISCHER GEORG SCHAEFER KGAA, FAG CUSCINETTI S.P.A. AND FAG BEARINGS CORP., DEFENDANT-INTERVENORS

Court No. 89-06-00356

Plaintiff brings this action to contest part of the final determinations by the United States International Trade Commission (ITC), in the antidumping and countervailing duty injury investigations of imports of antifriction bearings. Plaintiff challenges the ITC's finding of six separate "like products" and "domestic industries" instead of one. Plaintiff argues that the ITC is required to define the terms in accordance with the definitions provided by the petitioner and that the ITC used an impermissibly narrow construction of "like product." Also, plaintiff asserts that the determination in the present case is not supported by substantial evidence in the administrative record.

Held: As a matter of law, the ITC has the authority to determine what domestic products should be considered like products, even if that determination differs from the like product description in the petition, provided the determination is supported by substantial evidence. Further, the Court finds that the ITC's like product determination in this action is supported by substantial evidence and is otherwise in accordance with law.

[ITC determination affirmed as to Counts 1 and 2 of Plaintiff's Complaint.]

(Dated September 11, 1990)

Stewart and Stewart (*Eugene L. Stewart*, *Terence P. Stewart*, *James R. Cannon. Jr.* and *Lane S. Hurewitz*) for plaintiff.

James A. Toupin, Assistant General Counsel, Office of the General Counsel, U.S. International Trade Commission (*Stephen A. McLaughlin* and *Frances Marshall*) for defendant.

Coudert Brothers (*Robert A. Lipstein*, *J. Triplett Mackintosh* and *James G. Dwyer*) for Nippon Seiko K.K. and NSK Corp.

Donovan Leisure Newton & Irvine (*Pierre F. de Ravel d'Esclapon*) for ICSA Industria Cuscinetti S.p.A.

Barnes, Richardson & Colburn (*Robert E. Burke*, *Donald J. Unger*, *Brian F. Walsh* and *Jesse M. Gerson*) for NTN Corp., NTN Bearing Corp. of America, American NTN Bearing Manufacturing Corp. and NTN Toyo Bearing Co., Ltd.

Katten Muchin Zavis & Dombroff (*Thomas A. Rothwell Jr.*, *Joseph A. Vicario, Jr.*, *James M. Lyons* and *Alfred G. Scholle*) for INA Bearing Co., Inc., INA Walzlager Schaeffler RG, INA Roulements, S.A., and INA Bearing Co., Ltd.

Powell, Goldstein, Frazer & Murphy (*Peter O. Suchman* and *Neil R. Ellis*) for Koyo Seiko Co., Ltd. and Koyo Corp. of U.S.A.

Hogan & Hartson (*Lewis E. Leibowitz*, *Walter A. Smith, Jr.* and *David W. Phillips*) for Hoesch Rothe Erde Schmiedag AG and Rotek Inc.

Gibson, Dunn & Crutcher (*Joseph H. Price* and *Naoyuki Agawa*) for Nippon Thompson Co., Ltd.

Howrey & Simon (*Herbert C. Shelley* and *Jennifer Rie*) for SKF USA, Inc., AB SKF, SKF GmbH and SKF Gleitlager GmbH, SKF France, RIV-SKF Industries, S.p.A., SRF Sverige AB and SKF (U.K.) Limited.

Powell, Goldstein, Frazer & Murphy (*Peter O. Suchman, Neil R. Ellis* and *T. Georae Davis, Jr.*) for Caterpillar Inc.

Adduci, Mastriani, Meeks & Schill (*Louis S. Mastriani, Barbara A. Murphy, Ralph H. Sheppard* and *Cathy S. Neuren*) for FAG Kugelfischer Georg Schaefer KGaA, FAG Cuscinetti S.p.A. and FAG Bearings Corp.

OPINION

TSOUCALAS, *Judge*: Plaintiff brings this action pursuant to Rule 56.1 of the Rules of this Court to challenge the finding by the International Trade Commission ("ITC" or "Commission") of six separate "like products" and "domestic industries" in its investigations of antidumping and countervailing duty injuries involving imports of antifriction bearings. *Antifriction Bearings (Other than Tapered Roller Bearings) and Parts Thereof From the Federal Republic of Germany, France, Italy, Japan, Romania, Singapore, Sweden, Thailand, and the United Kingdom*, USITC Pub. 2185, Inv. Nos. 303-TA-19 and 20 and 731-TA-391-399 (May 1989) ("Final Determinations").[1] This Court's jurisdiction is based on 28 U.S.C. § 1581(c) (1988).

BACKGROUND

Torrington filed an antidumping and countervailing duty petition on March 31, 1988 on behalf of the domestic industry which produces antifriction bearings. In the petition, Torrington described one class or kind of merchandise, to wit, all antifriction bearings (except tapered roller bearings). Torrington also requested that the ITC find a single like product and a single domestic industry.

In May, 1988, the ITC issued a preliminary determination which stated that there was reason to believe that six domestic industries were materially injured, or threatened with such injury, because of unfairly imported bearings from nine countries. *Antifriction Bearings (Other than Tapered Roller Bearings) and Parts Thereof From the Federal Republic of Germany, France, Italy, Japan, Romania, Singapore, Sweden, Thailand, and the United Kingdom*, USITC Pub. 2083, Inv. Nos. 303-TA-19 and 20 and 731-TA-391-399 (May 1988) ("Preliminary Determinations"). The Commission differentiated among bearings based on the type of rolling element each bearing contains. As a result, the ITC found that each of the following comprised a different like product produced by a different industry: (1) ball bearings; (2) spherical roller bearings; (3) cylindrical roller bearings; (4) needle roller bearings; (5) plain bearings; and (6) other antifriction devices, such as ball screws and linear guides. *Id.* at 22.

The Commission issued its final determinations in May 1989 and found that there were six like products. USITC Pub. 2185. Five of the like products corresponded to the classes or kinds of merchandise found by the International Trade Administration ("ITA"); they are ball bearings, spherical roller bearings, cylindrical roller bearings, needle roller bear-

[1] Though plaintiff's Complaint lists eleven counts, this opinion concerns only Counts 1 and 2, that is, those dealing with the Commission's like product determinations.

ings and plain bearings. However, the Commission found that slewing rings constituted a separate, sixth, like product.

Subsequently, the ITC rendered negative injury determinations for spherical roller bearings, needle roller bearings and slewing rings, and affirmative determinations for ball bearings, cylindrical roller bearings and spherical plain bearings. *Final Determinations* at 7. Plaintiff asserts that the Commission's approach "substantially narrowed the scope of the ultimate antidumping and countervailing duty orders, and thereby adversely affected Torrington." *Memorandum of Points and Authorities in Support of the Torrington Company's Motion for Partial Summary Judgment on the Agency Record* at 8 ("Plaintiff's Memorandum").

Discussion

I. ITC's Authority to Determine Like Products:

Torrington contends that the ITC must accept the definition of like product and domestic industry provided by the petition, and does not possess the authority to modify that description.

The Commission is authorized by statute to make a determination based on the evidence before it as to whether a domestic industry has been materially injured (or is threatened with such injury) by reason of imports at less than fair value ("LTFV"). 19 U.S.C. § 1673b(a)(1) (1988). The imports under investigation must cause material injury or threaten such injury to a domestic industry which produces like products, that is, products which are "like, or in the absence of like, most similar in characteristics and uses with, the article subject to an investigation under this subtitle." 19 U.S.C. § 1677(10) (1988).

Torrington's complaint is that the ITC should have made its determination based on Torrington's assertion that all antifriction bearings (except tapered roller bearings) constitute one like product and one domestic industry. It is well settled that the ITC has the authority to determine whether or not one or more domestic industries have been injured by reason of LTFV imports. This Court repeatedly has upheld the ITC when its determinations have deviated from the contentions made in the petition, provided those determinations were supported by substantial evidence. *Roquette Freres and Roquette Corp. v. United States*, 7 CIT 88, 93, 583 F. Supp. 599, 603 (1984); *Kenda Rubber Indus. Co. v. United States*, 10 CIT 120, 123, 630 F. Supp. 354, 357 (1986); *Mitsubishi Elec. Corp. v. United States*, 12 CIT ___, ___, 700 F. Supp. 538, 563 (1988), *aff'd*, 898 F.2d 1577 (Fed. Cir. 1990).

Plaintiff also claims that the ITC's like product determination must be consistent with the ITA's class or kind finding. *Plaintiff's Memorandum* at 14. It is settled law that the ITC's like product determination is separate and distinct from the ITA's determination of the class or kind of merchandise. *See Mitsubishi*, 898 F.2d at 1584. While the ITC does not have the authority to modify the ITA's finding of class or kind, it has the right to make its own determination as to what should be considered a like product. *Badger-Powhatan v. United States*, 9 CIT 213, 217, 608 F.

Supp. 653, 657 (1985). Inconsistencies in the agencies' determinations are not, *per se*, contrary to law. Indeed, the possibility that they will reach inconsistent conclusions is "built into the law." *Algoma Steel Corp. v. United States*, 12 CIT ____, ____, 688 F. Supp. 639, 642 (1988), *aff'd*, 865 F.2d 240 (Fed. Cir. 1989), *cert. denied*, 109 S. Ct. 3244 (1989). Hence, the ITC was within its discretion when it found that there were six different like products in the instant investigation.

II. ITC's Interpretation of "Like Product":

Torrington also asserts that the Commission "applied an impermissibly narrow construction of the 'like product' and industry." *Plaintiff's Memorandum* at 23.[2] In support of its position, Torrington cites the legislative history to the Trade Agreements Act of 1979, which states that

> [t]he requirement that a product be "like" the imported article should not be interpreted in such a narrow fashion as to permit minor differences in physical characteristics or uses to lead to the conclusion that the product and article are not "like" each other, nor should the definition of "like product" be interpreted in such a fashion as to prevent consideration of an industry adversely affected by the imports under investigation.

S. Rep. No. 249, 96th Cong., 1st Sess. 90-91, *reprinted in* 1979 U.S. CODE CONG. & ADMIN. NEWS 381, 476-77. Essentially, plaintiff is contending that, in finding that there were six like products in the investigation of antifriction bearings, the Commission "impermissibly" relied on minor differences in characteristics and uses.

It appears that plaintiff has misunderstood the mandate of the statute and its legislative history. The Senate Report cited above warns against permitting minor differences between domestic products and imported articles from keeping them from being compared to *each other*. In the present action, the ITC has found distinctions "*among* the domestic products, not *between* domestic products and imported products." *Defendant's Memorandum in Opposition to Plaintiff's Motion for Partial Summary Judgment* at 83 ("Defendant's Memorandum") (emphasis in original).

Nonetheless, there is no question that differences exist among antifriction bearings. Whether the differences among the various bearings are minor or significant is a factual issue for the Commission to decide. This Court recently held that "[i]t is up to [the] ITC to determine objectively what is a minor difference." *Exportadores*, 12 CIT at ____, 693 F. Supp. at 1169. Provided the determination is reasonable and supported by the evidence, the Court will affirm the Commission. Given the vast differences among the products investigated by the ITC, it would be impossible for the Court to give specific directives as to what would constitute a minor

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[2] The determinations of like product and domestic industry are inextricably intertwined, since industry is defined in terms of like product. Hence, "the like product determination is the industry determination." *Asociacion Colombiana de Exportadores de Flores v. United States*, 12 CIT ___, ___, 693 F. Supp. 1165, 1169 (1988).

difference.[3] The issue for the Court is whether the evidence used by the ITC to make its determination rises to the level of substantial evidence and supports the conclusion.

III. Substantial Evidence:

The Court will uphold a determination by the Commission unless it is not supported by substantial evidence in the administrative record or is otherwise not in accordance with law. 19 U.S.C. § 1516a(b)(1)(B) (1988). A decision by the ITC will not be overturned merely because the Court would have decided the issue differently, had the issue come before the Court *de novo*. *Mitsubishi*, 12 CIT at ___, 700 F. Supp. at 558; *SCM Corp. v. United States*, 4 CIT 7, 10, 544 F. Supp. 194, 197 (1982). The function of the Court is to determine whether there is substantial evidence to support the ITC's conclusions.

In making its determination as to what domestic products constitute like products, the ITC considers similar, but not identical, factors to those considered by the ITA in its class or kind determination.[4] These consist of "(1) physical appearance, (2) interchangeability, (3) channels of distribution, (4) customer perception, (5) common manufacturing facilities and production employees, and where appropriate, (6) price." Final Determinations at 11.[5] The use of these factors by the ITC in its like product determinations has been upheld by this Court. Exportadores, 12 CIT at ___, 693 F. Supp. at 1169-70.

In the final determinations in the present action, the ITC determined that antifriction bearings did not all comprise one like product. Rather, the Commission distinguished the bearings on the basis of the rolling element each type of bearing contains, and found that the bearings actually constitute six like products. *Final Determinations* at 33. The six like products found by the Commission are: (1) ball bearings, (2) spherical roller bearings, (3) cylindrical roller bearings, (4) needle roller bearings, (5) plain bearings, and (6) slewing rings.[6]

The Commission's final determinations examine the differences among antifriction bearings due to different rolling elements, using the six criteria outlined above. The Commission found that most of the products within the scope of the investigation share four physical characteristics. They are an inner ring, an outer ring, some kind of rolling element

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[3] In *Exportadores*, the Court affirmed the ITC's determination that the differences among carnations, chrysanthemums and gerberas were not minor and thus those flowers were separate like products. 12 CIT at ___, 693 F. Supp. at 1170. But in *Sony Corp. of America v. United States*, the Court found that Trinitron color picture tubes were not separate like products from other color picture tubes, despite certain unique qualities. 13 CIT ___, ___, 712 F. Supp. 978, 983 (1989). These dissimilar results demonstrate that every like product determination "must be based on the particular record at issue" and the "unique facts of each case." *Exportadores*, 12 CIT at ___. 693 F. Supp. at 1169.

[4] The criteria upon which Commerce relies include "the general physical characteristics of the merchandise, the expectation of the ultimate purchasers, the channels of trade in which the merchandise moves, the ultimate use of the merchandise, and cost." *Diversified Prods. Corp. v. United States*, 6 CIT 155, 162, 572 F. Supp. 883, 889 (1983).

[5] Price was not considered by the Commission to be an appropriate factor in this investigation.

[6] Differences among the first five types of bearings were enumerated and discussed extensively in *The Torrington Co. v. United States*, 14 CIT ___, Slip Op. 90-73 (Aug. 3, 1990), wherein this Court upheld Commerce's determination that those five categories of bearings constituted five different classes or kinds of merchandise. Slewing rings were included in the scope of Commerce's final determination but without explanation as to which class or kind they belonged. The ITC, however, determined that slewing rings constitute a separate like product. *Final Determinations* at 20.

and a cage or separator which holds the rolling elements in place.[7] Furthermore, all bearings function to reduce friction between moving parts and are manufactured by the same processes. *Id.* at 15.

However, the Commission concluded that those similar characteristics did not, in and of themselves, determine the character of a bearing. Instead, the Commissioners found that within the category of antifriction bearings there are separate like products depending on the type of rolling element in the bearing. This is due to the fact that "[t]he type of rolling element, or lack of a rolling element, is the key physical characteristic that determines the functional capability of the bearing and the use to which it is put." *Id.* at 16-17.

The differing physical characteristics for ball bearings, spherical roller bearings, cylindrical roller bearings, needle roller bearings and spherical plain bearings are discussed at length by the Commission. *Id.* at A-4 - A-12. Ball bearings have ball-shaped rolling elements while cylindrical roller bearings contain cylindrical rollers. Needle roller bearings also have cylindrical roller elements, but have a higher length-to-diameter ratio than cylindrical roller bearings. Spherical roller bearings employ spherical rollers. Finally, spherical plain bearings do not have balls or rollers; they "consist of a spherically shaped inner ring that is self-aligning in an outer ring." *Id.* at A-4.

Slewing rings, which were added to the ITA investigation late in the process, were found by the ITC to constitute a sixth like product. *Id.* at 18-20. The evidence distinguishing slewing rings from the other bearings is substantial. Slewing rings have inner and outer rings and balls or rollers but normally are considerably larger than other bearings. Unlike other bearings, they also contain gears, cut on either the inner or outer ring. *Id.* at 100.

Slewing rings are used primarily in heavy equipment and "perform a 'turntable' function in cranes, tank turrets, radio telescopes, hoisting equipment, and the like." *Id.* at 19. For instance, slewing rings can support both the load hanging from a crane as well as radial and thrust loads, while other bearings "cannot accommodate tilting loads." *Id.* at B-40. Also, they are custom made for each end user and therefore are sold almost exclusively to end users, making their channels of distribution distinct from those of other bearings. Because of their atypical applications and designs, slewing rings are differentiated from other bearings in the perceptions of customers as well. Equally as important, slewing rings are produced one at a time, whereas other bearings normally are mass-produced on assembly lines. *Id.* at 101. Accordingly, the Court holds that the Commission's determination that slewing rings constitute a separate like product is supported by substantial evidence.

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[7] It should be noted that Torrington's own Industry Manager acknowledged that most needle roller bearings do not have an outer ring, and its counsel admitted that spherical plain bearings do not have a rolling element. *See Transcript of Conference Before Director of Operations* (Apr. 21, 1988), Administrative Record (Public) Doc. 46 at 15, 103 ("Conference Transcript"). Hence, the contention that all antifriction bearings contain all four characteristics is subject to multiple exceptions.

As for the other factors considered by the ITC, the evidence indicates that interchangeability of bearings at the design stage is extremely limited. *Id.* at 17. For instance, as the buyer for Caterpillar, Inc., a major purchaser of antifriction bearings, explained, "there is no way that the ball bearings which are needed for alignment, not load carrying, could be used instead of needle bearings, which have high load bearing capacity for small envelope size."[8] *Conference Transcript* at 184 (testimony of Michael Dykstra). While some interchangeability is a theoretical possibility, in reality substitution of one type of bearing for another requires redesign of the product to conform it to the new bearing's functional capabilities. The evidence convincingly supports the conclusion that the six like products are not commonly interchangeable.

The third factor is the channels of distribution for the bearings. Plaintiff contends that the evidence demonstrates that "the channels of distribution, whether to [original equipment manufacturer] buyers or replacement distributors are the same for different types of bearings." *Plaintiff's Memorandum* at 65. There is evidence that bearings are marketed through one of two channels, direct sales to end users or through independent distributors to the end users.[9] *Defendant's Memorandum* at 102. But there is little evidence to support the Commission's conclusion that bearings move through different channels of distribution based on their rolling elements.[10]

At least one foreign maker of bearings, NSK Corp., admitted that no such distinction is made in the distribution channels of bearings. *Pre-Hearing Brief of Nippon Seiko K.K. (NSK)*, AR (Pub.) Doc. 412 at 5. While catalogues and price lists may be segregated by type of bearing, the channels through which bearings are distributed are not. However, the fact that one of the six criteria does not support the determination is not dispositive. *Exportadores*, 12 CIT at ____, 693 F. Supp. at 1170. If the balance of the evidence constitutes substantial evidence, then the determination will be affirmed.

The next factor considered by the ITC is customer perceptions. Torrington asserts that "[a]ll customers expect the bearings they purchase will function to reduce friction between moving parts." *Plaintiff's Memorandum* at 62. Such a broad and all-inclusive description of customer perceptions might be expected from a casual, superficial observer, but it is not a credible statement from a member of the industry.

If a purchaser of parts for heavy construction equipment considered ball bearings to be equivalent to spherical plain bearings, it is difficult to imagine that purchaser would remain on the job for long. The testimony

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[8] Caterpillar's buyer added that "engineers agree that it is ludicrous to suggest that bearings of different types are readily substitutable." *Conference Transcript* at 184.

[9] The government has proffered much evidence indicating that price lists and catalogues furnished by distributors are marketed in groups based on the type of rolling element they contain. See price lists attached to petition, AR (Pub.) Doc. 1. Price lists and catalogues do not, however, reflect whether the goods move through common channels of distribution. They merely reflect marketing and advertising technique, a factor which was not stated by the ITC as a consideration in its like product determination.

[10] For example, there is no evidence that ball bearings are sold directly to end users while needle roller bearings are sold through distributors. The exception is slewing rings, which, as discussed above, generally are sold directly to end users.

of Caterpillar's buyer makes this point perfectly clear. He states that "[c]ertain bearings are required to perform certain mechanical tasks. And the limitations imposed by a dimension on capacity strengths dictate which bearing must be used for a specific application." *Conference Transcript* at 184. Clearly, purchasers of bearings are aware of the differences among bearings and their functional capabilities.

Lastly, the Commission examined the manufacturing facilities, equipment and processes used in the production of antifriction bearings. The Commission found that "many producers make only one type of bearing," but even those who make more than one type generally used a separate manufacturing facility for different types of bearings. *Final Determinations* at 17. Plaintiff argues that antifriction bearings share "common manufacturing facilities, equipment and production employees." *Plaintiff's Memorandum* at 68.

The record indicates that "[m]any companies rationalize their production by size, precision, and/or type of rolling element." *Final Determinations* at A-18. Thus, plaintiff claims, the rolling element is not the only distinguishing feature in the rationalization of bearings production. Yet, of those producers who make more than one type of bearing, only the petitioner reported common manufacturing facilities for assorted types of bearings.

At the Commission Hearing, NSK's spokesman went so far as to criticize Torrington for its common production facilities because of the advantages in capacity utilization of "dedicated equipment that produces a particular type of bearing within a very small size range." *Transcript of Hearing Before Commissioners Cass, Newquist, Eckes, Lodwick and Rohr* ("Hearing Transcript") (March 30, 1989) at 207-08 (testimony of Bob Komasarer). He added that "[y]ou would not see that in Japan * * * [or] Europe." The President of SKF confirmed that his company's domestic facilities "are in fact dedicated" to producing one type of bearing each. *Id.* at 211 (testimony of Raymond B. Langton). INA's Chief Executive Officer concurred, asserting that INA has separate plants for ball bearings, cylindrical roller bearings and needle bearings. *Id.* (testimony of Guenter Maschkiwitz).

This argument was further buttressed by NTN's Marketing and Sales Manager who maintained that "you never produce a ball bearing on a needle bearing line or produce a spherical bearing on a ball bearing line. All of the equipment is specially designed for just that production line." *Conference Transcript* at 151 (testimony of Eric Rasmussen). Hence, while some factories may produce more than one type of bearing, there is substantial evidence to support the conclusion that within a factory, separate facilities are used for different bearings based on their rolling elements.[11]

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[11]Defendant maintains that "the separation of production lines [is what] was critical to the Commission's like product analysis, not the fact that separate production lines might be under one roof." *Defendant's Memorandum* at 106-07.

The production of antifriction bearings involves four major processing steps which are the same for all the bearings subject to this investigation. They are: green machining, heat treating, finishing, and assembly and inspection. *Final Determinations* at A-15. The Commission explained that the same green machining equipment may be used to manufacture the components of several different types of bearings. *Id.* at A-17. This is because the size and the form of raw material (not the type of bearing) are the key factors that determine the type of machine to be used for green machining. Also, the same heat treatment machinery is used for all types of bearings, except tapered roller bearings.

It is in the finishing and assembly stages that there are significant distinctions based on the type of bearing. Finishing consists of grinding (and sometimes, honing) the bearing components. In grinding, "most machines are specifically designed for one or two types of bearings, although certain machines can be used to grind a wider variety of bearing types." *Id.* Nevertheless, the grinding *process* is distinct for each type of bearing.

The evidence in the record indicates that the manufacturing facilities and equipment used to produce the six like products found by the ITC differ at certain levels on the basis of the rolling element. While the same machinery may be used at certain stages of production for different types of bearings, there is substantial evidence to support the conclusion that, in general, the facilities and equipment are different. It is clear, however, that the same processing *steps* are used in the manufacture of all antifriction bearings subject to this investigation.

The finding of some similarities among the products delineated by the Commission is not sufficient to overturn the determinations when there is otherwise substantial evidence to support its findings. Substantial evidence does not require that the overwhelming weight of the evidence support the Commission's conclusions. *Atlantic Sugar, Ltd. v. United States*, 744 F.2d 1556, 1563 (Fed. Cir. 1984); *Matsushita Elec. Indus. Co. v. United States*, 750 F.2d 927, 936 (Fed. Cir. 1984); *Exportadores*, 12 CIT at ____, 693 F. Supp. at 1170. It requires that the evidence be more than a "mere scintilla." *Matsushita*, 750 F.2d at 933. Undeniably, that standard has been met in this case.

CONCLUSION

The administrative record in the present action contains substantial evidence to support the Commission's determinations. The evidence is convincing that there were considerable differences among the six like products in physical appearance, interchangeability, customer perceptions, and manufacturing facilities and equipment. The various bearings share only common channels of distribution and processing steps. The Court therefore holds that the determinations that ball bearings, spherical roller bearings, cylindrical roller bearings, needle roller bearings, spherical plain bearings and slewing rings are separate like products are supported by substantial evidence and are otherwise in accordance with the law. Accordingly, those determinations of the ITC are affirmed.

ABSTRACTED CLASSIFICATION DECISIONS

DECISION NO./DATE JUDGE	PLAINTIFF	COURT NO.	ASSESSED	HELD	BASIS	PORT OF ENTRY AND MERCHANDISE
C90/354 9/7/90 Re, C.J.	Fathom/ H.I.M., Inc.	86–12–01492	359.50 or 376.56	A359.60 or 359.60 A735.20 or 376.56	Agreed statement of facts	Tampa Wetsuits or divesuits, etc.

ANNOUNCEMENT

Chief Judge Edward D. Re has announced the call of the Seventh Annual Judicial Conference of the United States Court of International Trade. The Conference is scheduled for Monday, October 15, 1990, in The Ballroom at Windows on the World, 106th Floor, One World Trade Center, New York, New York and will commence at 9:15 a.m.

The theme of the Conference is: "The United States Court of International Trade in a World in Transition."

The Honorable Frank J. Guarini will present the Honorable Sam M. Gibbons, Chairman, Subcommittee on Trade, Committee on Ways and Means, United States House of Representatives, with the Court's Distinguished Service Award for his outstanding contributions to the administration of justice in the field of international trade law.

The Honorable Helen W. Nies, Chief Judge, United States Court of Appeals for the Federal Circuit, will be a special guest at the Conference.

The Conference will be attended by the Judges of the United States Court of International Trade, officials from the International Trade Commission, the Customs Service, the Departments of Justice, Commerce, and Treasury; members of the Bar of the Court; and other distinguished guests.

More than 350 lawyers, the largest single gathering in the United States of attorneys interested in the field of customs and international trade law, have participated in each of the past five Annual Judicial Conferences.

All interested persons are invited to attend. For further information, please write to:

USCIT Judicial Conference
c/o Office of the Clerk
United States Court of International Trade
One Federal Plaza
New York, New York 10007

Dated: August 31, 1990.

JOSEPH E. LOMBARDI,
Clerk of the Court.

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